United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

10:00 AM
2:08-13703 Marsh Communications Services Inc **Chapter 7**

#1.00 APPLICANT: LESLIE, WALLACE & ASSOCIATES LLP, Accountant for Trustee

Hearing re [131] Trustee's Final Report and Applications for Compensation

Docket 0

Tentative Ruling:

10/4/2016

The applicant has not filed a final fee application in connection with this hearing. The Court approves as final the fees and expenses that Judge Neiter awarded on an interim basis on May 1, 2013 [Doc. No. 97]:

Fees: $17,872.00
Expenses: $28.00

Because Judge Neiter ordered that 40% of all funds collected by the Trustee be held in reserve to be paid to unsecured creditors, there are insufficient funds in the estate to pay professional fees in full. Therefore, consistent with the Trustee's proposed distribution, the applicant's compensation will be limited to $5,799.06 in previously paid fees and $28.00 in previously paid expenses.

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

Party Information

Debtor(s):

Marsh Communications Services Inc — Represented By
Martin J Brill

Trustee(s):

Sam S Leslie (TR) — Represented By
Neal H Levin
Carolyn A Dye

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

10:00 AM

CONT... Marsh Communications Services Inc **Chapter 7**

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

10:00 AM
2:08-13703 Marsh Communications Services Inc **Chapter 7**

#2.00 APPLICANT: FREEBORN & PETERS LLP, Attorney for Trustee

Hearing re [131] Trustee's Final Report and Applications for Compensation

Docket 0

Tentative Ruling:

10/4/2016

The applicant has not filed a renewed final fee application in connection with this hearing. The applicant previously filed a final fee application before Judge Neiter; however, Judge Neiter awarded fees only on an interim basis. The Court approves as final the fees and expenses that Judge Neiter awarded on an interim basis on May 1, 2013 [Doc. No. 96]:

Fees: $210,000.00
Expenses: $26,175.97

Because Judge Neiter ordered that 40% of all funds collected by the Trustee be held in reserve to be paid to unsecured creditors, there are insufficient funds in the estate to pay professional fees in full. Therefore, consistent with the Trustee's proposed distribution, the applicant's compensation will be limited to $68,140.29 in previously paid fees and $26,175.97 in previously paid expenses.

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

Party Information

Debtor(s):

Marsh Communications Services Inc — Represented By
Martin J Brill

Trustee(s):

Sam S Leslie (TR) — Represented By

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

10:00 AM

CONT... **Marsh Communications Services Inc** **Chapter 7**

Neal H Levin
Carolyn A Dye

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

10:00 AM
2:08-13703 Marsh Communications Services Inc **Chapter 7**

#3.00 APPLICANT: SAM S LESLIE, Trustee

Hearing re [131] Trustee's Final Report and Applications for Compensation

Docket 0

Tentative Ruling:

10/4/2016

No objection has been filed in response to the Trustee's Final Report. This court approves the fees and expenses, and payment, as requested by the Trustee, as follows (amounts previously paid on an interim basis, if any, are now deemed final):

Total Fees: $7,715.17 (of which $7,715.17 has already been paid)

Total Expenses: $48.07 (of which $48.07 has already been paid)

U.S. Bankruptcy Court charges: $293.00

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

Party Information

Debtor(s):

Marsh Communications Services Inc — Represented By
Martin J Brill

Trustee(s):

Sam S Leslie (TR) — Represented By
Neal H Levin
Carolyn A Dye

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

10:00 AM
2:08-13703 Marsh Communications Services Inc **Chapter 7**

#3.10 OTHER: Law Office of Carolyn A. Dye

Hearing re [131] Trustee's Final Report and Applications for Compensation

Docket 0

Tentative Ruling:

10/4/2016

The applicant has not filed a final fee application in connection with this hearing. The Court approves as final the fees and expenses that Judge Neiter awarded on an interim basis on May 1, 2013 [Doc. No. 98]:

Fees: $39,709.50
Expenses: $0.00

Because Judge Neiter ordered that 40% of all funds collected by the Trustee be held in reserve to be paid to unsecured creditors, there are insufficient funds in the estate to pay professional fees in full. Therefore, consistent with the Trustee's proposed distribution, the applicant's compensation will be limited to $12,884.85 in previously paid fees.

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

Party Information

Debtor(s):

Marsh Communications Services Inc — Represented By
Martin J Brill

Trustee(s):

Sam S Leslie (TR) — Represented By
Neal H Levin
Carolyn A Dye

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

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CONT... Marsh Communications Services Inc **Chapter 7**

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

10:00 AM
2:13-12277 Edward Gennady Barsky **Chapter 11**

#4.00 Hearing
RE: [186] Motion For Sanctions/Disgorgement NOTICE OF MOTION AND MOTION FOR ORDER GRANTING RELIEF FOR DEBTORS IMPROPER DISCLOSURE OF CONFIDENTIAL INFORMATION; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MARGARET TAYLOR

FR. 8-2-16; 8-10-16

Docket 186

Tentative Ruling:

10/4/2016: For the reasons set forth below, the Court finds that Lodgepole has failed to satisfy its evidentiary burden that Barsky breached the Settlement Agreement. Accordingly, Lodgepole's Motion seeking sanctions against Barsky is DENIED.

Pleadings Filed and Reviewed:

1) Notice of Motion and Motion for Order Granting Relief for Debtor's Improper Disclosure of Confidential Information ("Motion") [Doc. No. 186]
   a) Request for Judicial Notice in Support of Motion for Order Granting Relief for Debtor's Improper Disclosure of Confidential Information ("Lodgepole RJN") [Doc. No. 187]
2) Former Debtor Gennady Barsky's Opposition to the Motion for Order Granting Relief for Debtor's Improper Disclosure of Confidential Information ("Opposition") [Doc. No. 193]
   a) Former Debtor Gennady Barsky's Request for Judicial Notice in Support of His Opposition to the Lodgepole Entities' Motion for Order Re Disclosure of Confidential Information ("Barsky RJN") [Doc. No. 194]
   b) Former Debtor Gennady Barsky's Evidentiary Objections to the Lodgepole Entities' Request for Judicial Notice and to the Declaration of Margaret Taylor [Doc. No. 195]
3) Reply in Support of Motion for Order Granting Relief for Debtor's Improper Disclosure of Confidential Information ("Reply") [Doc. No. 196]
4) Declarations Submitted by Lodgepole in Support of the Motion:
   a) Declaration of John Simonse [Doc. No. 199]

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CONT... Edward Gennady Barsky **Chapter 11**

b) Declaration of Glenn H. Wechsler [Doc. No. 200]
c) Supplemental Declaration of Margaret L. Taylor [Doc. No. 201]
d) Declaration of Michael P. Connolly [Doc. No. 202]
e) Declaration of Cheryl A. Noll [Doc. No. 203]
f) Declaration of Richard T. Bowles [Doc. No. 204]

5) Declarations and Other Evidence Submitted by Barsky in Opposition to the Motion:
   a) Former Debtor Gennady Barsky's Evidentiary Objections to the Declarations of Glenn H. Wechsler, Michael P. Connolly, Richard T. Bowles, Cheryl A. Noll, and John Simonse, and to the Supplemental Declaration of Margaret Taylor [Doc. No. 208]
   b) Former Debtor Gennady Barsky's Supplemental Request for Judicial Notice in Support of His Opposition to the Lodgepole Entities' Motion for Order Re Disclosure of Confidential Information [Doc. No. 209]
   c) Former Debtor Gennady Barsky's Supplemental Declaration in Support of His Opposition to the Lodgepole Entities' Motion for Order Re Disclosure of Information [Doc. No. 212]
   d) Rozaliya Kats's Declaration in Support of Former Debtor Gennady Barsky's Opposition to the Lodgepole Entities' Motion for Order Re Disclosure of Confidential Information [Doc. No. 214]
   e) Former Debtor Gennady Barsky's Separate Statement of Disputed Facts in Support of His Opposition to the Lodgepole Entities' Motion for Order Re Disclosure of Confidential Information [Doc. No. 215]
6) Response to Lodgepole to Former Debtor Gennady Barsky's Evidentiary Objections to the Declarations of Glenn H. Wechsler, Michael P. Connolly, Richard T. Bowles, Cheryl A. Noll, and John Simonse, and to the Supplemental Declaration of Margaret Taylor [Doc. No. 217]

I. Introduction

On August 10, 2016, the Court conducted a hearing on Lodgepole Investments, LLC's ("Lodgepole") motion for sanctions against Edward Gennady Barsky ("Barsky"). **[Note 1]** Lodgepole contended that Barsky had committed contempt of court by violating a nondisclosure provision contained in a settlement agreement (the "Settlement Agreement") that the Court had approved in connection with Barsky's Chapter 11 case. Lodgepole sought civil compensatory contempt sanctions against Barsky in the amount of $90,807.50. In addition to seeking damages under a contempt theory, Lodgepole further asserted that it was entitled to damages on the grounds that

the alleged violations of the nondisclosure provision were (1) a breach of contract and (2) a breach of California's Uniform Trade Secrets Act.

In its August 10 Ruling, the Court found that it had ancillary jurisdiction to enforce its order approving the Settlement Agreement, notwithstanding the fact that Barsky's Chapter 11 case had been dismissed on April 25, 2014. The Court found that its ancillary jurisdiction extended to Lodgepole's attempt to recover damages on a breach of contract theory, but that ancillary jurisdiction did not extend to Lodgepole's claims for violation of California's Uniform Trade Secrets Act. The Court rejected Lodgepole's contention that it had supplemental jurisdiction over the Uniform Trade Secrets claims.

The Court found that the settlement agreement was enforceable through contempt, but noted that Lodgepole had failed to submit admissible evidence in support of its motion. The Court continued the hearing to enable Lodgepole to submit admissible evidence. The Court ordered that the continued hearing would be devoted exclusively to determining the following issues of fact:

1) Did Barsky violate the Lodgepole Settlement Agreement's Nondisclosure Provision by disclosing confidential information in the litigation involving the Crest Place property?
2) Did Barsky violate the Lodgepole Settlement Agreement's Nondisclosure Provision by disclosing confidential information in the litigation against his parents?
3) Did Barsky violate the Lodgepole Settlement Agreement by recording a Certificate of Dissolution of Monaco?
4) If Barsky did violate the Lodgepole Settlement Agreement in any of the ways set forth above, what were Lodgepole's damages? (Because the Court lacks jurisdiction over the Uniform Trade Secrets claims, no damages under the Uniform Trade Secrets Act will be considered.)

Ruling Continuing Hearing on Lodgepole's Motion for Sanctions ("August 10 Ruling") [Doc. No. 198] at 21–22.

II. Findings of Fact

Having reviewed the declarations submitted by Lodgepole in support of the Motion, Barsky's evidentiary objections thereto, **[Note 2]** the declarations submitted by Barsky in opposition to the Motion, and Barsky's separate statement of disputed facts in support of his opposition to the Motion, the Court makes the following findings of fact:

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CONT... Edward Gennady Barsky **Chapter 11**

Barsky's Chapter 11 Petition

On January 28, 2013, Barsky and his affiliate, St. Tropez Capital, LLC ("St. Tropez") commenced voluntary Chapter 11 petitions. On January 31, 2013, Lodgepole Investments, LLC ("Lodgepole") filed an action in the United States District Court for the Northern District of California (Case No. C13-0446-NC) (the "District Court Action") against Barsky and his two companies, St. Tropez and Monaco Development, LLC ("Monaco"). The District Court Action alleged that Barsky had misappropriated at least $11.9 million from Lodgepole. On May 30, 2013, Lodgepole filed a proof of claim in Barsky's Chapter 11 case in the amount of $13 million. On the same date, Margaret "Peggy" Taylor ("Taylor"), a managing member of Lodgepole, filed a proof of claim against Barsky in the amount of $1,705,436.04. On June 13, 2013, Lodgepole filed a proof of claim against St. Tropez in the amount of $13 million.

The Lodgepole Settlement Agreement

On September 20, 2013, Barsky, Barsky's ex-wife, St. Tropez, and Lodgepole entered into a settlement agreement (the "Settlement Agreement"). In exchange for dismissing the District Court Action with prejudice and withdrawing the proofs of claim filed in the Barsky and St. Tropez cases with prejudice, Lodgepole received interests in several parcels of real property, cash from the sale proceeds of another real property, and a diamond ring. Settlement Agreement at ¶¶ 5–8.

The Settlement Agreement contains the following Nondisclosure Provision:

> Gennady [Barsky] has had access to, knowledge of, and may have written or electronic records of private, and sensitive information relating to the Lodgepole Entities and Taylor, and their respective investors, members, borrowers and advisers, including, but not limited to, social security numbers and other consumer credit information, financial records, including tax returns, as well as confidential and proprietary business records and information of the Lodgepole Entities, including, but not limited to, investor underwriting materials, borrower loan applications, company financial records, electronic account logins, etc. (collectively, "Confidential Information"). The direct or indirect use or disclosure of such Confidential Information may place the Lodgepole Entities and Taylor and their respective investors, members, borrowers, and advisers at risk of serious harm and any disclosure or use of this Confidential Information may cause impairment or damage, financial and otherwise, to these persons and may violate applicable civil and criminal laws. Accordingly, Gennady [Barsky], St. Tropez and Nellie

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CONT... Edward Gennady Barsky **Chapter 11**

> agree not to disclose or use any Confidential Information directly or indirectly for any purpose. Notwithstanding the foregoing, nothing in this provision shall prevent a Party from disclosing or using such Confidential Information to the extent necessary to comply with applicable laws or to pursue or defend any current or future legal action, including, but not limited to, an action to enforce this Agreement.

Settlement Agreement at ¶14.

The Settlement Agreement contains a Nondisparagement Provision:

> The Parties agree not to disparage any of the other Parties and shall refrain from using inflammatory language and making unsubstantiated accusations of fraud, dishonesty, or wrong-doing against each other, their respective employees, professional advisors, or any other person working for or providing services to a Party, or investors, in any further communications or documents filed in connection with any judicial, quasi-judicial, equitable, administrative, or regulatory proceedings of any nature.

Id. at ¶13.

The Settlement Agreement further provides: "The resolution of any and all disputes between the Parties herein concerning this Agreement shall be resolved by the Bankruptcy Court, which relief may be sought by motion." *Id.* at ¶20.

On October 24, 2013, the Court approved the Settlement Agreement. The order approving the Settlement Agreement provides in part: "The Settlement Agreements are APPROVED, and shall be enforceable against all parties thereto." *See* Doc. No. 99. On April 25, 2014, the Court entered an order granting the Debtor's motion to dismiss the case ("Dismissal Order") [Doc. No. 167]. The Dismissal Order provides: "The Court shall retain jurisdiction with respect to the following limited matters: … overseeing and entering orders as may be necessary to enforce the terms of the Lodgepole Settlement."

Lodgepole's Policies Regarding the Confidentiality of Investor Information

Lodgepole funds private money loans secured by real property or other assets. Supplemental Taylor Decl. at ¶3. The identities of Lodgepole's investors are confidential and are not publicly disclosed. *Id.* Investors do not even know the identities of each other unless they have been referred by another investor. *Id.* Privacy is extremely important to Lodgepole's investors. *See id.* at ¶4 (testimony of Taylor) ("I know most of the Lodgepole Entities investors personally. Many of them have been business colleagues in other ventures and some investors are family members. Based upon my personal relationship with the investors, I know their privacy is of the

utmost importance to them. None of our investors want anyone to know what investments they choose to make, which means they want the Lodgepole Entities to maintain the privacy of their identities and addresses, not merely their financial information."). From the company's inception, Lodgepole has enacted policies providing that investor information is never disclosed to anyone. *Id.*

Crest Place Property Litigation

On March 10, 2014, Lodgepole filed a complaint (the "Beltramo Complaint") against Jeffrey Beltramo ("Beltramo") for equitable subrogation, commencing the case entitled *Lodgepole Investments, LLC v. Beltramo et al.* (LASC Case No. BC538850) (the "Beltramo Action"). Supplemental Taylor Decl. at ¶10; Barsky's RJN at Ex. A. On May 13, 2014, Taylor received an e-mail from a Lodgepole investor. Supplemental Taylor Decl. at ¶12. The investor stated that he had been served with a deposition subpoena, including a request for production of documents, in the Beltramo Action. *Id.* The investor was extremely concerned about the violation of his privacy. *Id.* Taylor subsequently spoke with other investors who had been subpoenaed. *Id.* at ¶15. The investors were surprised, upset, and confused about receiving subpoenas demanding the production of documents and a personal appearance. *Id.*

On May 14, 2014, Lodgepole's counsel Richard Bowles sent a letter to Beltramo's counsel, Patrick Jacobs, demanding that the subpoenas upon Lodgepole's investors be withdrawn. Bowles Decl. at ¶5. On May 15, 2014, Jacobs responded, refusing to withdraw the subpoenas. *Id.* at ¶6. On May 16, 2014, Bowles again demanded that Jacobs withdraw the subpoenas, and advised Jacobs that he would be filing an Ex Parte Application to quash the subpoenas. *Id.* at ¶7. After Jacobs declined to withdraw the subpoenas, Bowles filed a motion for a protective order and a companion motion to disqualify Jacobs and his firm. *Id.* at ¶10. Jacobs then withdrew the subpoenas, and no hearing on either motion took place. *Id.*

Lodgepole has failed to establish, either by clear and convincing evidence or by a preponderance of the evidence, **[Note 3]** that Barsky violated the Nondisclosure Agreement by providing the identity of Lodgepole's investors to Beltramo. In support of its claims, Lodgepole offers the testimony of Taylor, its founder and managing member. Taylor testifies: "Based on the investors identified and the addresses where they were served with subpoenas, the only person who could have provided Beltramo and his attorney with the information used in the 366 Requests for Production of Documents sent to Lodgepole Investments and the deposition subpoenas served on the Lodgepole Entities' investors was Barsky." Supplemental Taylor Decl. at ¶13.

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CONT... Edward Gennady Barsky **Chapter 11**

Contrary to Taylor's testimony, the Court finds that Barsky was not the only one who could have disclosed the confidential information. In the Beltramo Complaint, Lodgepole alleges that Leonard Coniff provided Lodgepole professional accounting services from 2009 to 2012. Beltramo Complaint at ¶19 (Barsky RJN at Ex. A). Those accounting services, Lodgepole alleges, included reviewing Lodgepole's QuickBooks entries and preparing Lodgepole's federal and state tax returns. *Id.* at ¶¶19–20. The Beltramo Complaint alleges that Coniff is Beltramo's business partner. *Id.* at ¶26.

Based on Lodgepole's allegations in the Beltramo Complaint, the Court finds that it is equally plausible that Coniff could have disclosed the Lodgepole investor's identities to Beltramo, rather than Barsky. As Beltramo's business partner, Coniff certainly would have had a motive to disclose the investor identities in order to coerce Lodgepole into dropping the Beltramo Action. And as set forth in Barsky's related motion to impose sanctions against Lodgepole, prior to the filing of the Beltramo Complaint, Lodgepole had commenced an action against Coniff. In that action, Lodgepole alleged that Coniff conspired with Barsky to embezzle Lodgepole's funds. This would give Coniff an additional motive to disclose Lodgepole's confidential information.

Lodgepole's evidence that it was Barsky who disclosed the investor's identities is based on Lodgepole's contention that Barsky was the only person who had both access to the information and a motive to disclose it. Since it is equally likely that Coniff could have disclosed the information, Lodgepole has failed to show that it is more likely than not that Barsky was the source of the disclosure. Having failed to show by a preponderance of the evidence that Barsky disclosed the information, Lodgepole cannot recover damages under a breach of contract theory. This also forecloses Lodgepole's ability to recover damages under a contempt theory, as the clear and convincing standard that Lodgepole must satisfy to be entitled to contempt damages is more demanding than the preponderance of the evidence standard.

Lodgepole asserts that Barsky violated the Nondisclosure Provision by disclosing confidential information to the Henleys, against whom Lodgepole was prosecuting an unlawful detainer action. Lodgepole submits testimony of Michael Connolly, who represented Lodgepole in connection with the action against the Henleys. Connolly states that the Henleys produced approximately 198 pages of internal Lodgepole e-mails. Connolly states that the Henleys were not authorized to receive the e-mails, and that the only person from Lodgepole on the e-mails was Barsky. Connolly concludes that the Henleys must have obtained the e-mails from Barsky. According to Lodgepole, Barsky's alleged unauthorized disclosure of confidential information to the Henleys shows that Barsky has a pattern and practice of disclosing Lodgepole's

confidential information, making it more likely that Barsky was the source of the disclosures in the Beltramo Action. Lodgepole also points to Barsky's supplemental declaration, in which Barsky states that he disclosed Lodgepole's confidential information to his parents approximately one year before he signed the Settlement Agreement (that admission is discussed in greater detail below). This admission, Lodgepole asserts, is further evidence of Barsky's pattern and practice of disclosing Lodgepole's confidential information.

Lodgepole's evidence of Barsky's alleged predilection to disclose its confidential information is still not sufficient to show that it is more likely than not that Barsky disclosed the confidential information. As discussed, Coniff had access to the confidential information as well as a strong motive to disclose that information. The evidence that Barsky may have previously disclosed Lodgepole's confidential information does nothing to diminish the possibility that Coniff, who was also adverse to Lodgepole, was the source of the disclosure. Having failed to show that it is more likely than not that Barsky disclosed the information, Lodgepole also fails to meet the more demanding clear and convincing evidence standard.

Barsky Parents Litigation

On October 31, 2014, Lodgepole commenced an action in the Contra Costa Superior Court ("State Court") against Barsky's parents, Vladimir and Rozaliya Kats (the "Barsky Parents"). Supplemental Taylor Decl. at ¶17. Lodgepole alleged that the Barsky Parents had been unjustly enriched based on Barsky's transfer of $900,000 of Lodgepole's funds to them. *Id.*

On April 14, 2016, the Barsky Parents filed a cross-complaint for equitable indemnity (the "Cross-Complaint"), naming 45 of Lodgepole's current and former investors as cross-defendants. *Id.* at ¶18. On June 10, 2016, the State Court awarded $8,250 in sanctions against the Barsky Parents' attorneys for filing the Cross-Complaint (the "Sanctions Order"). The Sanctions Order provides in relevant part:

> The court finds that the legal contentions in the cross-complaint are not warranted by existing law or by a nonfrivolous argument for an extension of the law, that the allegations that there is a basis on which to require equitable indemnity from plaintiffs' members do not have evidentiary support and are not likely to have evidentiary support, and that the assertion of the claims in the cross-complaint is objectively unreasonable and goes beyond permissible zealous advocacy.

Sanctions Order (Lodgepole RJN at Ex. 12).

The Barsky Parents obtained the names of Lodgepole's investors from Barsky in

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CONT... Edward Gennady Barsky **Chapter 11**

November 2012, before Barsky signed the Lodgepole Settlement Agreement on September 20, 2013. Barsky testifies:

> Between 2006 and 2012, the Lodgepole Entities issued various types of loans, some of which were secured by real property and some not. I was familiar with all of such loans because I kept the Lodgepole Entities' books and records in QuickBooks. As a matter of habit, I periodically created and maintained backup files.
>
> Before I resigned from the Lodgepole Entities, I transferred all of my backup files into an external hard drive and gave it to my parents, Vladimir and Rozaliya Kats. I did this in case Taylor attempted to modify, manufacture, or otherwise spoil evidence regarding the records I maintained for the Lodgepole Entities. Taylor had threatened to ruin me and my family, so I advised my parents to become acquainted with the information contained in the hard drive. I believed it would become necessary or helpful in the future because of something Taylor might do to try to hurt me or my family.

Supplemental Barsky Decl. at ¶¶4–5.

Barsky's disclosure of Lodgepole's investors to the Barsky Parents in November 2012 was not a violation of the Settlement Agreement's Nondisclosure Provision. The Nondisclosure Provision is written in the present tense: "Gennady [Barsky], St. Tropez and Nellie agree not to disclose or use any Confidential Information directly or indirectly for any purpose." The Nondisclosure Provision does not apply to past disclosures of confidential information. Because Barsky has established that his parents obtained the confidential information before Barsky signed the Settlement Agreement, Lodgepole has failed to establish, by either a preponderance of the evidence or by clear and convincing evidence, that Barsky violated the Settlement Agreement. Accordingly, Lodgepole is not entitled to recover damages in connection with this alleged violation under either its breach of contract theory or its contempt theory.

Monaco Certificate of Dissolution

Lodgepole alleges that Barsky violated the Settlement Agreement by recording a certificate of dissolution of Monaco. Lodgepole did not submit any additional evidence in support of its contention that it was damaged Barsky's recordation of the certificate of dissolution of Monaco.[1] **[Note 4]** Lodgepole has failed to present sufficient evidence to show that it suffered damages in connection with Barsky's recordation of the Monaco Certificate of Dissolution.

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CONT... Edward Gennady Barsky **Chapter 11**

Based upon the foregoing, the Motion is DENIED. Barsky shall submit a conforming order, incorporating this tentative ruling by reference, within seven days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Nathaniel Reinhardt or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1

This tentative ruling assumes familiarity with the previous ruling issued on August 10, 2016 ("August 10 Ruling") [Doc. No. 198].

Note 2

The Court's rulings on Barsky's evidentiary objections are set forth at the conclusion of this tentative ruling.

Note 3

Lodgepole seeks damages against Barsky under two theories. First, Lodgepole seeks civil compensatory contempt sanctions against Barsky based upon Barsky's alleged violation of the Lodgepole Settlement Agreement's Nondisclosure Provision. To obtain civil compensatory contempt sanctions, Lodgepole must show by "clear and convincing evidence" that Barsky violated the Nondisclosure Provision. *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002). Second, Lodgepole seeks damages against Barsky on the theory that the alleged violation of the Nondisclosure Agreement was a breach of contract. To obtain damages on a breach of contract theory, Lodgepole must show that Barsky violated the Nondisclosure Provision by a preponderance of the evidence.

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CONT... Edward Gennady Barsky **Chapter 11**

Note 4

In connection with the previous hearing, Lodgepole submitted the Monaco Certificate of Dissolution ("Certificate") and a declaration from Taylor authenticating the Certificate. However, Lodgepole did not submit sufficient declaration testimony supporting its contention that it was damaged by Barsky's recordation of the Certificate. The only statement in the Taylor declaration addressing the Certificate was the conclusory assertion that "Lodgepole incurred fees and expenses in the amount of $1,250.00 to rectify the filing of the Monaco Certificate of Dissolution," Taylor Decl. at ¶12. That statement falls short of satisfying Lodgepole's evidentiary burden that it suffered damages.

Rulings on Barsky's Evidentiary Objections

The Court first addresses objections as to relevance that apply to multiple declarations. The Court then addresses other objections that are specific to each declaration.

Objections as to Relevance

In its August 10 Ruling, the Court held that portions of Margaret Taylor's declaration relating to Barsky's alleged embezzlement of funds from Lodgepole and Barsky's subsequent resignation from Lodgepole were not relevant to the Motion. The Court explained: "The issue before the Court is not whether Barsky embezzled funds, but whether Barsky violated the terms of the Lodgepole Settlement Agreement." August 10 Ruling at 23. The Court sustains Barsky's objections to the following declaration testimony, on the grounds that it is not relevant to whether Barsky violated the Lodgepole Settlement Agreement:

1) Supplemental Taylor Decl. [Doc. No. 201]:
   a) **Decl. at ¶6, lines 12–13:** "Barsky was forced to resign as a manager of the Lodgepole Entities in November 2012 after I discovered that he had misappropriated approximately $11.9 million from the companies."
   b) **Decl. at ¶6, lines 16–17:** "Some of the funds embezzled by Barsky were invested in real estate propertied held by St. Tropez Capital, LLC ("St. Tropez")."
   c) **Decl. at ¶10, lines 6–9:** "The Beltramo Action was filed because Barsky had improperly used some of Lodgepole Investments' money to purchase the real property located at 11960 Crest Place, Beverly Hills, CA ("Crest Place") in or about May 2011."

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CONT... Edward Gennady Barsky **Chapter 11**

d) **Decl. at ¶10, lines 9–11:** "However, a deed of trust for the benefit of Lodgepole Investments was not recorded until November 2012, which by that time was in fourth position instead of first position as it should have been."

e) **Decl. at ¶24, lines 8–12:** "Some investors withdrew from the Lodgepole Entities when it was first discovered that Barsky had misappropriated funds because they did not want to be involved in litigation with Barsky. In fact, some of the cross-defendants named by the Barsky Parents in their cross-complaint are no longer investors of the Lodgepole Entities, and have not been for several years, for this very reason."

2) Simonse Decl. [Doc. No. 199]:

a) **Decl. at ¶6, lines 7–9:** "Barsky was forced to resign as a manager of the Lodgepole Entities in November 2012, due to alleged misappropriation of funds from the Lodgepole Entities."

b) **Decl. at ¶8, lines 16–19:** "The Beltramo Action was filed because Barsky had improperly used some of Lodgepole Investments' money to purchase the real property located at 11960 Crest Place, Beverly Hills, CA ("Crest Place") in or about May 2011."

c) **Decl. at ¶8, lines 19–21:** "However, a deed of trust for the benefit of Lodgepole Investments was not recorded until November 2012, which by that time was in fourth position instead of first position as it should have been."

In its August 10 Ruling, the Court observed that Lodgepole had failed to allege any damages in connection with allegations that Barsky (1) improperly obtained Lodgepole's tax returns and (2) improperly disclosed information to the Henleys. Based upon the absence of damages, the Court found that these issues were not relevant. Barsky objects to the Wechsler and Connolly declarations, which address these issues, on the grounds of relevance. Barsky's objections are overruled. The Wechsler and Connolly declarations are relevant because they support Lodgepole's allegation that Barsky had a pattern and practice of disclosing Lodgepole's confidential information.

Other Objections Applying to Specific Declarations

Bowles Decl. [Doc. No. 204]

1) **Decl. at ¶3, lines 12–13 and Exhibit A (deposition subpoena to Stephen E. Taylor for personal appearance and production of documents):** "On or about May 13, 2014, I was advised that third party investors of the Lodgepole Entities were served deposition subpoenas for personal appearance and production of

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documents in the Beltramo Action (55 categories of requests)."

Barsky's Objection: *Hearsay (FRE 801, 802); improper testimony of content of a document (FRE 1002); lacks foundation (FRE 602); completeness of related writings (FRE 106).* What Bowles was "advised" is inadmissible hearsay offered to prove that third party investors of the Lodgepole Entities were served with subpoenas. Further, Bowles's characterization of the alleged recipients of the subpoenas as "investors" is improper testimony of the contents of a writing in violation of Rule 1002 of the Federal Rules of Evidence. Exhibit A to Bowles' Declaration is a single subpoena for personal appearance and production of documents and things to an individual, Stephen Taylor, which does not identify that individual as an "investor" of either of the Lodgepole Entities. No other subpoenas are attached. FRE 106.

Ruling: Objections overruled in part and sustained in part. The statement "I was advised that third party investors of the Lodgepole Entities were served with deposition subpoenas" is hearsay without an exception. However, the fact that Lodgepole investors were served with deposition subpoenas is established by the Supplemental Taylor Declaration (as set forth below, the Court overrules Barsky's evidentiary objections to the portions of the Taylor Declaration establishing that investors were served with subpoenas).

The objections as to Exhibit A, the deposition subpoena to Stephen Taylor, are overruled. FRE 106 provides: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." The Court overrules Barsky's objection that the subpoenas upon investors other than Stephen Taylor must also be produced. The content of the subpoenas is not at issue. The issue is whether Lodgepole's investors received unwarranted and harassing subpoenas as a result of Barsky's unauthorized disclosures. Fairness does not require that Lodgepole produce copies of every subpoena that was served upon a Lodgepole investor for the purpose of establishing that it was damaged by Barsky's unauthorized disclosures.

Further, there is adequate foundation for Exhibit A. FRE 901(a) provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." As Lodgepole's attorney, Bowles has furnished sufficient evidence that the subpoena is what it claims to be.

Bowles' characterization of Stephen Fry as an investor of Lodgepole does not violate FRE 1002. Bowles is testifying, based upon his personal knowledge, that

Fry is a Lodgepole investor. At no point does Bowles testify that Fry's identity as a Lodgepole investor is established by means of the subpoena.

There is sufficient foundation for Bowles' testimony. Bowles testifies that he is an attorney for Lodgepole. This establishes that Bowles has personal knowledge to testify regarding litigation matters that Lodgepole has been involved in.

2) **Decl. at ¶4, lines 16–23:** "These [Requests for Production of Documents propounded by Beltramo] included 225 requests as to 14 investors. Many of the Requests were duplicative of the requests included in the subpoenas. Our responses made it clear that no such documents existed as there was no communications with the third party investors concerning the subject matter of this action. My office also objected to the requests as not calculated to lead to the discovery of admissible evidence as the investors' private identity and financial information is protected and confidential. We then advised that the individuals did not have any information about this investment."
Barsky's Objection: *Improper testimony of content of a document (FRE 1002); relevance (FRE 401, 402); hearsay (FRE 801, 802); lacks foundation (FRE 602).* Bowles improperly testifies about the contents of Beltramo's Requests for Production of Documents and Lodgepole's Responses thereto in violation of Rule 1002 of the Federal Rules of Evidence, which requires that the writings themselves be produced as evidence in order to prove their contents, i.e. whether Beltramo's Requests for Production of Documents were duplicative of the document requests that were included in the subpoenas to the "investors" of the Lodgepole Entities. Bowles also testifies that "Our responses made it clear that no such documents existed as there was no communications with the third party investors concerning the subject matter of this action" for the truth of the assertion made in his responses, which is hearsay without an exception.

Bowles lays no foundation for how he has personal knowledge that "the individuals did not have any information about this investment" but offers the statement for its truth. In addition, Bowles's personal belief that Beltramo's requests for production of documents did not seek relevant information in the Beltramo Action has no bearing on the issue of whether Barsky provided the Lodgepole Entities' allegedly confidential information to Beltramo or Beltramo's attorneys.
Ruling: Objections overruled in part and sustained in part. The hearsay objection is overruled. The statement "Our responses made it clear that no such documents existed as there was no communications with the third party investors concerning

the subject matter of this action" is not offered to prove the truth of what was contained in the discovery responses. The statement is offered to prove that the documents sought by the discovery requests did not exist. So construed, the statement does not constitute hearsay.

The objection to the statement "Many of the Requests were duplicative of the requests included in the subpoenas" under FRE 1002 is sustained. Lodgepole is required to introduce into evidence the Requests for Production of Documents ("RFP") if it wants to establish that the RFP were duplicative of the subpoenas.

There is sufficient foundation for Bowles' statement that "the individuals did not have any information about this investment." Bowles testifies that as Lodgepole's counsel, he responded to discovery requests served upon Lodgepole's investors. This is sufficient foundation to establish Bowles' personal knowledge of whether Lodgepole's investors had information responsive to the discovery requests.

The testimony is relevant because it addresses the issue of whether Lodgepole was damaged by incurring additional litigation costs as a result of Barsky's alleged unauthorized disclosures.

3) **Decl. at Ex. B:** May 14, 2014 letter to Patrick Jacobs, Beltramo's attorney in the Beltramo Action, advising Jacobs of the confidential nature of the information and his improper use of it.
Barsky's Objection: *Hearsay (FRE 801, 802).* These statements are inadmissible hearsay offered to prove the truth of the matter asserted – that Beltramo and/or his attorneys colluded with Barsky to violate the Lodgepole Settlement Agreement. They were created for litigation purposes and to support an Ex Parte Application to quash, are testimonial in nature, and do not fall within an exception to the rule against hearsay.
Ruling: Objection overruled in part and sustained in part. The letter is not admissible for the purpose of establishing that Patrick Jacobs obtained confidential information from Mr. Barsky, but is admissible to show that Lodgepole incurred litigation costs in connection with Barsky's alleged unauthorized disclosures.

4) **Decl. at Ex. D, ¶¶3–6:** May 16, 2014 letter to Patrick Jacobs, advising Jacobs that continued use of the confidential information was improper.
Barsky's Objection: *Hearsay (FRE 801, 802).* Paragraphs 3-6 contain inadmissible hearsay offered to prove the truth of the matter asserted—that

Beltramo and/or his attorneys colluded with Barsky to violate the Lodgepole Settlement Agreement. They were created for litigation purposes and to support an Ex Parte Application to quash, are testimonial in nature, and do not fall within an exception to the rule against hearsay.
Ruling: Objection overruled in part and sustained in part. The letter is not admissible for the purpose of establishing that Patrick Jacobs obtained confidential information from Mr. Barsky, but is admissible to show that Lodgepole incurred litigation costs in connection with Barsky's alleged unauthorized disclosures.

5) **Decl. at ¶8, lines 17–20:** "Interestingly, although I very specifically addressed the fact that the confidential information had to have come from Mr. Barsky, Mr. Jacobs did not deny this."
Barsky's Objection: *Hearsay (FRE 801, 802); improper testimony of content of a document (FRE 1002).* Bowles is mischaracterizing an omission in a writing as an affirmative admission and offering it as the truth.
Ruling: Objections overruled. As to FRE 1002, Lodgepole is not attempting to prove the content of the letter; Lodgepole is attempting to prove that Barsky disclosed confidential information without authorization. *See* Advisory Committee Notes to FRE 1002 ("Application of the rule requires a resolution of the question of whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, *even though a written record of it was made*…. For example, payment may be proved without producing the written receipt which was given") (emphasis added).
The testimony is not hearsay because it is not offered to prove the truth of the contents of the letter; it is offered to support the allegation that Barsky disclosed confidential information to Jacobs.

Noll Decl. [Doc. No. 203]

1) **Decl. at ¶5, lines 19–20:** "Lodgepole and I believed that the Barsky Parents' cross-complaint was frivolous and designed to harass Lodgepole and its managing member, Margaret Taylor."
Barsky's Objection: *Relevance (FRE 401, 402); lacks foundation (FRE 602).* Lodgepole's and Noll's belief regarding the nature and purpose of the cross-complaint has no bearing on whether Barsky violated the terms of the Lodgepole Settlement Agreement. *See* Tentative Ruling, page 45. In addition, Noll fails to lay a foundation on which this belief is based, and how she has personal

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knowledge of Lodgepole's "belief," where Lodgepole is not a natural person.
Ruling: Objections overruled. As one of Lodgepole's attorneys, Noll is qualified to testify as to her impressions of the cross-complaint. The testimony is relevant because it addresses whether the attorneys' fees incurred by Lodgepole in connection with the cross-complaint were reasonable.

2) **Decl. at ¶6, line 26:** ". . . to prevent further harassment of and damages to Lodgepole."
Barsky's Objection: *Relevance (FRE 401, 402); improper testimony of content of a document (FRE 1002), hearsay (FRE 801, 802).* Lodgepole's alleged need for the Temporary Restraining Order has no bearing on whether Barsky violated the terms of the Lodgepole Settlement Agreement. Noll is assuming that "harassment of and damages to Lodgepole," which is yet to be established, and lays no foundation for how she has personal knowledge of the alleged harassment and damages.
Ruling: Objections overruled, for the reasons set forth in ¶1, above.

3) **Decl. at ¶8, lines 2–4:** ". . . and made the argument to the Superior Court that even if the TRO were to be issued, there was nothing preventing him or the Barsky Parents from telling the investor defendants that they had been named in the cross-complaint and sending them a copy of it."
Barsky's Objection: *Hearsay (FRE 801, 802); relevance (FRE 401, 402).* Noll is offering Mr. Abu Assal's alleged argument for the truth of the matter—that he intended to notify the investor defendants that they had been named and send them a copy of the cross-complaint. As such, it violates the hearsay rule, and there is no applicable exception here. In addition, Mr. Abu Assal's argument against prior restraint, based on the Katses' constitutional right to freedom of speech and freedom of petition, has no bearing on whether Barsky violated the terms of the Lodgepole Settlement Agreement.
Ruling: Objection sustained as to hearsay. (The statement is not excepted as the admission of a party opponent, because it was made on behalf of the Barsky Parents, not Barsky.)

4) **Decl. at ¶10, lines 9–10:** "In agreeing to this briefing schedule, Mr. Abu-Assal specifically waived the 21 day "safe harbor" requirement of CCP § 128.7."
Barsky's Objection: *Relevance (FRE 401, 402).* Whether Mr. Abu-Assal waived the 21 day "safe harbor" requirement has no bearing on whether Barsky violated

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the terms of the Lodgepole Settlement Agreement.
Ruling: Objection sustained.

5) **Decl. at ¶11, lines 14–16:** "The Sanctions Order stated that the Barsky Parents' cross-complaint was without merit and intended to harass or cause unnecessary delay or needless increase in the cost of litigation."
Barsky's Objection: *Improper testimony of content of a document (FRE 1002), hearsay (FRE 801, 802).* Noll is improperly testifying to the contents of the Sanctions Order in violation of Rule 1002 of the Federal Rules of Evidence. She is also offering the content of the Sanctions Order for the truth of the matter stated therein, which is impermissible hearsay without an exception.
Ruling: Objection sustained as to FRE 1002. However, the Supplemental Taylor Declaration has properly authenticated the Sanctions Order. The Court will rely upon the Sanctions Order itself for what the document states. Objection overruled as to hearsay. The Sanctions Order is admissible for the purpose of determining whether it is entitled to preclusive effect.

6) **Decl. at ¶16, lines 7–8:** "I anticipate I will spend at least another 100 hours on this matter, because the Barsky Parents have appealed Judge Spanos' ruling and award of sanctions."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Noll fails to lay a foundation for her conclusion that she will spend at least another 100 hours on this matter because of the appeal.
Ruling: Objection overruled. Noll's testimony regarding her previous involvement in the matter lays sufficient foundation for Noll to project the future amount of time she may be required to spend in connection with the appeal.

7) **Decl. at ¶17, lines 10–14 (and Exhibit A in its entirety):** "On or about July 5, 2016, my office received the Barsky Parents' request for admissions set three from Vladimir Kats served on Lodgepole in the Barsky Parents Action. Copy of the RFA is attached as Exhibit A. RFA number 48 requests that Lodgepole "[a] dmit that the 'assets' listed in YOUR 2011 tax return included the amounts that had been disbursed in connection with the CREST PROPERTY."
Barsky's Objection: *Relevance (FRE 401, 402).* The Requests for Admissions ("RFAs") have no bearing on the instant action because "Lodgepole does not claim that it suffered any damages in connection Barsky's access to its tax returns." Tentative Ruling, page 46, Note 2. Also, this information is publicly

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available by virtue of Lodgepole Investments' own complaint in the Beltramo Action.

In the Complaint in the Beltramo Action, Lodgepole Investments made a judicial admission as follows: "Conniff also prepared federal and state income tax returns for Lodgepole Investments and issued various federal tax reporting forms such as K-1s and 1099s. In performing these duties as a CPA, Conniff was required to review the QuickBooks accounting entries made by Barsky which documented the Barsky loan to St. Tropez for the purchase of the Crest Property. In April 2012, Conniff prepared the 2011 tax return for Lodgepole Investments whereby he verified that *the assets in Lodgepole Investments' QuickBooks files were also included on the tax returns which included the loan disbursements for the St. Tropez loan for the purchase of the Crest Property." See* Barsky's Supplemental Request for Judicial Notice, Exh. A, at p. 4, ¶ 21 (emphasis added).
Ruling: Objection overruled. The testimony is relevant because it addresses whether the Barsky Parents were in possession of confidential information obtained from Barsky. The testimony is further relevant since it speaks to Lodgepole's allegation that Barsky had a pattern and practice of disclosing Lodgepole's confidential information.

8) **Decl. at ¶17, lines 14–15:** "Lodgepole's 2011 tax return was not produced by Lodgepole in the Barsky Parents Action."
Barsky's Objection: *Relevance (FRE 401, 402).* Whether Lodgepole's 2011 tax return was produced has no bearing on the instant action because "Lodgepole does not claim that it suffered any damages in connection Barsky's access to its tax returns." See August 10, 2015 Ruling, Docket No. 198.
Ruling: Objection overruled. The testimony speaks to Lodgepole's allegation that Barsky had a pattern and practice of disclosing Lodgepole's confidential information.

Simonse Decl. [Doc. No. 199]

1) **Decl. at ¶3, lines 17–18:** "The identifies of our investors are secret and confidential."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Simonse's statement is demonstrably false and misleading as shown by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to

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Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled. Lodgepole disclosed Stephen Taylor's identity only after Lodgepole believed that Barsky had disclosed Taylor's identity without authorization. Lodgepole disclosed Taylor's identity in its motion for a protective order, which was an effort to prevent further violations of its investor's privacy. At the time Lodgepole disclosed Taylor's identity, the harm had already been done—Taylor had already received the privacy-invading subpoena. Barsky's objection implies that Lodgepole has carelessly disclosed its investors' identities, which is not the case.

There is sufficient foundation for Simonse's testimony. Simonse testifies that he is a managing member and custodian of records for Lodgepole, and that his job duties include reviewing and approving loans for Lodgepole and its affiliated entities. That testimony is sufficient to show that Simonse has personal knowledge of Lodgepole's policies and practices regarding the confidentiality of investor information.

2) **Decl. at ¶3, lines 18–19:** "There has never been any public disclosure of our investors' private consumer or financial information, let alone their identities."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Simonse has no personal knowledge and lays no foundation for his claim that there has never been a public disclosure of Lodgepole investors. In fact, his statement is demonstrably false as shown by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled, for the reasons set forth in ¶1, above.

3) **Decl. at ¶3, lines 19–20:** "The only people who have knowledge of this information are the managers of the Lodgepole Entities, and their accountants and attorneys."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Simonse has no personal knowledge and lays no foundation for this claim. In fact, this statement is demonstrably false as shown by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).

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Ruling: Objection overruled, for the reasons set forth in ¶1, above.

4) **Decl. at ¶3, lines 20–22:** "Our investors do not even know the identities of other investors unless they have been referred by one another."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Simonse has no personal knowledge and lays no foundation for his speculative conclusion as to what knowledge Lodgepole investors have.
Ruling: Objection overruled, for the reasons set forth in ¶1, above.

5) **Decl. at ¶4, line 28:** "We do not send the investors any information regarding the amount in the Lodgepole Entities, the amount of funds loaned to third parties, the terms of those loans or litigation that may arise therefrom."
Barsky's Objection: *Relevance (FRE 401, 402). The* information provided by Lodgepole to investors has no bearing on whether Barsky violated the Lodgepole Settlement Agreement.
Ruling: Objection overruled. The testimony is relevant because it supports Lodgepole's argument that its books and records are confidential and that confidentiality is very important to its investors.

6) **Decl. at ¶5, lines 3–5:** "Other than the current managers of the Lodgepole Entities, the only other individuals who are authorized to, and have knowledge of, the identities of the current or former investors of the Lodgepole Entities are the entities' accountant and attorneys."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Simonse has no personal knowledge and lays no foundation for this claim. In fact, this statement is demonstrably false as shown by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled, for the reasons set forth in ¶1, above.

7) **Decl. at ¶9, line 25:** "Among the demands were hundreds of requests for documents related to 13 current or prior investors of Lodgepole Investments or Lodgepole Fund and one business colleague who never invested in either of the Lodgepole Entities. Of the individuals listed, only four people had a relationship with Lodgepole Investments at the time. One individual is a prior investor in

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Lodgepole Investments. Eight are (or were) investors in Lodgepole Fund – and not Lodgepole Investments – which has nothing to do with the Beltramo Action. One individual had no relationship with the Lodgepole Entities whatsoever."
Barsky's Objection: *Lacks foundation (FRE 602); improper testimony of content of a document (FRE 1002); relevance (FRE 401, 402).* Simonse fails to lay a foundation for how he knew or determined that certain requests related to current or prior investors, and their relationships with the Entities. In addition, Simonse is improperly testifying to the contents of a writing in violation of Rule 1002 of the Federal Rules of Evidence, which requires that the original Requests for Production be produced as evidence in order to prove their contents. Finally, this statement is not relevant to the issue of whether Barsky breached the Lodgepole Settlement Agreement and whether Lodgepole was damaged as a result.
Ruling: Objections overruled. There is sufficient foundation for Simonse's testimony. Simonse testifies that he is a managing member and custodian of records for Lodgepole, and that his job duties include reviewing and approving loans for Lodgepole and its affiliated entities. As Lodgepole's custodian of records, Simonse would have knowledge of Lodgepole's current and prior investors, and would have knowledge of the relationship of those investors to Lodgepole or to Lodgepole-affiliated entities.

The testimony does not violate FRE 1002. The testimony is not submitted to prove the content of the subpoenas; it is submitted to demonstrate that Lodgepole's investors received harassing and unnecessary subpoenas as a result of Barsky's alleged unauthorized disclosures. The testimony is relevant because it addresses whether Lodgepole was damaged by Barsky's alleged unauthorized disclosures.

8) **Decl. at ¶9, lines 3–5:** "None of the individuals identified in the Request for Production of Documents had any knowledge, information or documents related to Beltramo Action or the Crest Place property."
Barsky's Objection: *Speculative and lacks foundation (FRE 602); relevance (FRE 401, 402).* Simonse has no personal knowledge and lays no foundation for the unsubstantiated conclusion that none of the allegedly identified investors had relevant knowledge, information, or documents. In addition, even if Simonse's assertion is correct, this has no bearing on whether Barsky provided the Lodgepole Entities' allegedly confidential information to Jeffrey Beltramo and Beltramo's attorneys.
Ruling: Objections overruled. There is sufficient foundation for Simonse's

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testimony. Simonse testifies that he is a managing member and custodian of records for Lodgepole, and that his job duties include reviewing and approving loans for Lodgepole and its affiliated entities. That testimony is sufficient to show that Simonse has personal knowledge of whether certain of Lodgepole's investors would have been in possession of information relevant to the Beltramo Action or the Crest Place property. The testimony is relevant because it addresses whether Barsky's alleged unauthorized disclosures damaged Lodgepole. The testimony addresses whether Lodgepole was damaged by having its investors subjected to subpoenas calling for information which the investors could not provide.

Supplemental Taylor Decl. [Doc. No. 201]

1) **Decl. at ¶3, lines 15–17:** "The identities of the Lodgepole Entities investors are confidential. The Lodgepole Entities and I strictly maintain the privacy of the investors' identities and addresses, not merely their financial information."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Taylor's statement is demonstrably false and misleading as shown by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled. Lodgepole disclosed Stephen Taylor's identity only after Lodgepole believed that Barsky had disclosed Taylor's identity without authorization. Lodgepole disclosed Taylor's identity in its motion for a protective order, which was an effort to prevent further violations of its investor's privacy. At the time Lodgepole disclosed Taylor's identity, the harm had already been done—Taylor had already received the privacy-invading subpoena. Barsky's objection implies that Lodgepole has carelessly disclosed its investors' identities, which is not the case.

There is sufficient foundation for Simonse's testimony. Simonse testifies that he is a managing member and custodian of records for Lodgepole, and that his job duties include reviewing and approving loans for Lodgepole and its affiliated entities. That testimony is sufficient to show that Simonse has personal knowledge of Lodgepole's policies and practices regarding the confidentiality of investor information.

2) **Decl. at ¶3, lines 17–18:** "There has never been any public disclosure of our investors, their identities, or their private consumer or financial information."

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Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Taylor has no personal knowledge and lays no foundation for her claim that there has never been a public disclosure of Lodgepole investors. In fact, Taylor's statement is demonstrably false as shown by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled, for the reasons set forth in ¶1, above.

3) **Decl. at ¶3, lines 18–20:** "The only people who have knowledge of this information are the managers of the Lodgepole Entities, and their accountants and attorneys."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Taylor has no personal knowledge and lays no foundation for this claim. In fact, Taylor's statement is demonstrably false as shown by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled, for the reasons set forth in ¶1, above.

4) **Decl. at ¶3, lines 20–21:** "Our investors do not even know the identities of each other unless they have been referred by another investor, nor do they know the amounts invested by other investors."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Taylor has no personal knowledge and lays no foundation for her speculative conclusion as to what knowledge Lodgepole investors have.
Ruling: Objection overruled. Taylor testifies that she knows most of Lodgepole's investors personally, that most investors have been business colleagues in other ventures, and that some investors are family members. Supplemental Taylor Decl. at ¶4. That testimony sufficiently establishes that Taylor has personal knowledge of whether Lodgepole's investors know the identities of one another.

5) **Decl. at ¶4, lines 23–27:** "Based upon my personal relationship with the investors, I know their privacy is of the utmost importance to them. None of our investors want anyone to know what investments they choose to make, which means they want the Lodgepole Entities to maintain the privacy of their identities

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and addresses, not merely their financial information."
Barsky's Objection: *Lacks foundation (FRE 602).* Taylor makes sweeping characterizations about the importance of privacy to all of the investors based on her vaguely-defined "personal relationships" with some of them. She provides no facts or examples. In addition, Taylor's assertions are called into question by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled. Taylor testifies that she knows most of Lodgepole's investors personally, that most investors have been business colleagues in other ventures, and that some investors are family members. Supplemental Taylor Decl. at ¶4. That testimony is sufficient to establish Taylor's personal knowledge of the importance of privacy to Lodgepole's investors. The objection is also overruled for the reasons set forth in ¶1, above.

6) **Decl. at ¶4, lines 27–28:** "Accordingly, the Lodgepole Entities enacted policies from the companies' inception that investor information is never given out or disclosed to anyone."
Barsky Objection: *Speculative and lacks foundation (FRE 602).* Taylor has no personal knowledge and lays no foundation for this claim. In fact, Taylor's statement concerning the Lodgepole Entities' policies is contradicted by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled. Taylor testifies that she is a founder and managing member of Lodgepole. That testimony is sufficient to show that Taylor has personal knowledge of Lodgepole's policies and practices regarding the confidentiality of investor information. The objection is also overruled for the reasons set forth in ¶1, above.

7) **Decl. at ¶5, lines 1–2:** "… our investors do not have any knowledge regarding how their monies are used by the companies."
Barsky's Objection: *Speculative and lacks foundation (FRE 602); relevance (FRE 401, 402).*Taylor has no personal knowledge and lays no foundation for her speculative conclusion as to what knowledge Lodgepole investors have. This

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statement is not relevant to the issue of whether Barsky breached the Lodgepole Settlement Agreement and whether Lodgepole was damaged as a result.
Ruling: Objections overruled. Taylor testifies that she is a founder and managing member of Lodgepole. This testimony is sufficient to show that Taylor has personal knowledge of the information Lodgepole discloses to investors (and therefore personal knowledge of the investors' understanding of Lodgepole's operations). Taylor further testifies that she knows most of Lodgepole's investors personally, that most investors have been business colleagues in other ventures, and that some investors are family members. Supplemental Taylor Decl. at ¶4. This testimony further establishes that Taylor has personal knowledge of the investors' understanding of Lodgepole's operations.

The testimony is relevant because it corroborates Lodgepole's assertion that the identities of Lodgepole's investors could only have been revealed through Barsky's alleged unauthorized disclosures—the fact that Lodgepole keeps everything about its operations secret shows that it would be difficult for anyone to figure out the identity of its investors.

8) **Decl. at ¶5, lines 2–4:** "The investors do not have any involvement in or knowledge of the day-to-day operations of the Lodgepole Entities or any business decisions made by the Entities."
Barsky's Objection: *Speculative and lacks foundation (FRE 602); relevance (FRE 401, 402).* Taylor has no personal knowledge and lays no foundation for her speculative conclusion as to what knowledge Lodgepole investors have. This statement is not relevant to the issue of whether Barsky breached the Lodgepole Settlement Agreement and whether Lodgepole was damaged as a result.
Ruling: Objections overruled, for the reasons set forth in ¶7, above.

9) **Decl. at ¶5, lines 4–5:** "More specifically, the investors have no knowledge of or involvement with the loans we make or how those loans are secured."
Barsky's Objection: *Speculative and lacks foundation (FRE 602); relevance (FRE 401, 402).* Taylor has no personal knowledge and lays no foundation for her speculative conclusion as to what knowledge Lodgepole investors have. This statement is not relevant to the issue of whether Barsky breached the Lodgepole Settlement Agreement and whether Lodgepole was damaged as a result.
Ruling: Objections overruled, for the reasons set forth in ¶7, above.

10) **Decl. at ¶11, lines 23–24:** "None of the individuals identified in the Request for

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Production of Documents has any knowledge, information or documents related to Beltramo Action or the Crest Place property."

Barsky's Objection: *Speculative and lacks foundation (FRE 602); relevance (FRE 401, 402).* Taylor has no personal knowledge and lays no foundation for the unsubstantiated conclusion that none of the allegedly identified investors has relevant knowledge, information, or documents.

In addition, even if Taylor's assertion is correct, this has no bearing on whether Barsky provided the Lodgepole Entities' allegedly confidential information to Jeffrey Beltramo and Beltramo's attorneys.

Ruling: Objections overruled. Taylor testifies that she is a founder and managing member of Lodgepole. This testimony is sufficient to show that Taylor has personal knowledge of the information Lodgepole discloses to investors (and therefore personal knowledge of whether the investors would have knowledge, information, or documents related to the Beltramo Action or the Crest Place property). Taylor further testifies that she knows most of Lodgepole's investors personally, that most investors have been business colleagues in other ventures, and that some investors are family members. Supplemental Taylor Decl. at ¶4. This testimony further establishes that Taylor has personal knowledge of whether the identified investors had information responsive to the Request for Production.

The testimony is relevant because it addresses whether Lodgepole was damaged (by being required to incur additional costs complying with its discovery obligations) as a result of Barsky's alleged unauthorized disclosures.

11) **Decl. at ¶12, lines 25–26:** "On May 13, 2014, I received an e-mail from a former investor in Lodgepole Fund advising me he had been served with a deposition subpoena which included a request for production of documents."

Barsky's Objection: *Improper testimony of content of a document (FRE 1002); hearsay (FRE 801, 802).* Taylor is improperly testifying to the contents of a writing in violation of Rule 1002 of the Federal Rules of Evidence, which requires that the original email be produced as evidence in order to prove its contents. It is also hearsay without an exception.

Ruling: Objections overruled. As to hearsay, the e-mail in which the investor stated that he had been served with a deposition subpoena also stated that the investor was "extremely concerned about his privacy being breached." Per FRE 803(3), "[a] statement of the declarant's then-existing state of mind … or emotional … condition" is not excluded by the rule against hearsay. The investor's statement that he was concerned about his privacy being compromised

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CONT... Edward Gennady Barsky **Chapter 11**

because he had received a subpoena is a statement regarding the investor's then-existing state of mind and emotional condition. Therefore, the statement is not excluded by the rule against hearsay.

The objection under FRE 1002 is overruled. Lodgepole is not attempting to prove the contents of the e-mail within the meaning of FRE 1002; Lodgepole is instead attempting to prove that the investor was concerned about the privacy violation. *See* Advisory Committee Notes to FRE 1002 ("Application of the rule requires a resolution of the question of whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, *even though a written record of it was made*…. For example, payment may be proved without producing the written receipt which was given") (emphasis added).

12) **Decl. at ¶12, line 28:** "The former investor was extremely concerned about his privacy being breached, particularly since he withdrew his investment prior to the filing of this matter."
Barsky's Objection: *Improper testimony of content of a document (FRE 1002); hearsay (FRE 801, 802).* Taylor is improperly testifying to the contents of a writing in violation of Rule 1002 of the Federal Rules of Evidence, which requires that the original email be produced as evidence in order to prove its contents. In addition, Taylor is offering the investor's out-of-court statement for the truth of the matter asserted. As such, it violates the hearsay rule, and there is no applicable exception here.
Ruling: Objections overruled, for the reasons set forth in ¶11, above.

13) **Decl. at ¶12, lines 2–3:** "I also heard from other investors who had also been subpoenaed and they also expressed concern that their privacy had been compromised."
Barsky's Objection: *Hearsay (FRE 801, 802).* Taylor is offering these "other" investors' out-of-court statements for the truth of the matter asserted – that they were concerned that their privacy had been compromised. As such, it violates the hearsay rule, and there is no applicable exception here.
Ruling: Objection overruled, for the reasons set forth in ¶11, above.

14) **Decl. at ¶13, lines 4–8:** "Based on the investors identified and the addresses where they were served with subpoenas, the only person who could have provided Beltramo and his attorney with the information used in the 366 Requests for Production of Documents sent to Lodgepole Investments and the deposition

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CONT... Edward Gennady Barsky **Chapter 11**

subpoenas served on the Lodgepole Entities' investors was Barsky."
Barsky's Objection: *Speculative and lacks foundation (FRE 602); misleading and improper lay witness testimony (FRE 701, 702); improper testimony of content of a document (FRE 1002).* Taylor fails to provide any factual basis for how the investors identified and the addresses where they were served with subpoenas leads to the conclusion that this information could only have come from Barsky. Her unsubstantiated conclusion concerning the origin of this information is not rationally based on Taylor's perception and is similarly improper. Taylor's reference to the number of requests constitutes improper testimony concerning the content of a writing.
Ruling: Objections overruled. The testimony is not speculative or improper lay witness testimony. Based upon her testimony that Lodgepole does not disclose the identity of its investors and keeps all details of its operations secret, Taylor may rationally opine, in her capacity as a lay witness, that the disclosed information could have only come from Barsky.

The objection under FRE 1002 is overruled. Lodgepole is not attempting to prove the contents of the subpoenas within the meaning of FRE 1002; Lodgepole is instead attempting to prove that the information contained in the subpoenas could only have been obtained from Barsky. *See* Advisory Committee Notes to FRE 1002 ("Application of the rule requires a resolution of the question of whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, *even though a written record of it was made*…. For example, payment may be proved without producing the written receipt which was given") (emphasis added).

15) **Decl. at ¶14, lines 9–11:** ". . . the Lodgepole Entities have not provided their third party investors with any information regarding the funds used by Barsky to purchase the Crest Place property . . . ."
Barsky's Objection: *Lacks foundation (FRE 602); relevance (FRE 401, 402).* Taylor provides no foundation for the unsubstantiated allegation that Barsky used funds from the Entities to purchase the Crest Place property. This statement is not relevant to the issue of whether Barsky breached the Lodgepole Settlement Agreement and whether Lodgepole was damaged as a result.
Ruling: Objections overruled. The testimony is relevant because it shows that the subpoenaed investors had no information regarding the subject of the subpoenas, and therefore corroborates Lodgepole's contention that the purpose of the subpoenas was to harass Lodgepole's investors in order to pressure Lodgepole

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CONT... Edward Gennady Barsky **Chapter 11**

into a settlement. The objection under FRE 602 is overruled. Taylor testifies that she is a founder and managing member of Lodgepole, that Lodgepole is in the business of funding private money loans secured by real property and other assets, and that Barsky was formerly a member of Lodgepole. This testimony provides sufficient foundation for Taylor's testimony that Barsky used Lodgepole's funds to purchase the Crest Place property.

16) **Decl. at ¶14, lines 9–15:** "None of the individuals subpoenaed were in any way involved in the Beltramo Action . . . . The only documents they have received related to the Beltramo Action are the Deposition Subpoena and request for documents Beltramo's attorneys have sent to them."
Barsky's Objection: *Lacks foundation (FRE 602); relevance (FRE 401, 402).* Taylor has no personal knowledge and lays no foundation regarding the involvement of the subpoenaed individuals in the Beltramo Action and what documents they received in relation thereto.
This statement is not relevant to the issue of whether Barsky breached the Lodgepole Settlement Agreement and whether Lodgepole was damaged as a result.
Ruling: Objections overruled.

17) **Decl. at ¶15, lines 16–18:** "They advised me that they were surprised, upset and confused about receiving the deposition subpoenas for personal appearance including 55 categories of documents that were requested."
Barsky's Objection: *Hearsay (FRE 801, 802).* Taylor is offering these out-of-court statements for the truth of the matter asserted – that the subpoenaed individuals were upset about being subpoenaed. As such, it violates the hearsay rule, and there is no applicable exception here.
Ruling: Objection overruled. "A statement of the declarant's then-existing state of mind … or emotional … condition" is not excluded by the rule against hearsay. FRE 803(3).

18) **Decl. at ¶16, lines 20–21:** "Barsky knows that none of the investors in the Lodgepole Entities has any knowledge of the Lodgepole Investments monies used to purchase the Crest Place property."
Barsky's Objection: *Lacks foundation (FRE 602); relevance (FRE 401, 402).* Taylor has no personal knowledge and lays no foundation regarding what Barsky knows about any knowledge possessed by investors in the Lodgepole Entities.

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This statement is not relevant to the issue of whether Barsky breached the Lodgepole Settlement Agreement and whether Lodgepole was damaged as a result.

Ruling: Objections overruled. Taylor testifies that Barsky was formerly a managing member of Lodgepole. That provides sufficient foundation for Taylor to testify about Barsky's understanding of the knowledge that Lodgepole's investors had regarding the funds used to purchase the Crest Place property. The testimony is relevant because it addresses whether Barsky's alleged unauthorized disclosures damaged Lodgepole by causing Lodgepole's investors to receive subpoenas demanding information that they did not possess. The issue of whether Lodgepole's investors were subjected to upsetting subpoenas is relevant to whether Lodgepole sustained damages.

19) **Decl. at ¶16, lines 22–23:** "None of the investors, as indicated in our written discovery responses, has been provided any documents related to the Beltramo Action."

Barsky's Objection: *Improper testimony of content of a document (FRE 1002), hearsay (FRE 801, 802), relevance (FRE 401, 402).* Taylor is improperly testifying to the contents of a writing in violation of Rule 1002 of the Federal Rules of Evidence, which requires that the original discovery responses be produced as evidence in order to prove their contents. Taylor is also offering this out-of-court statement for the truth of the matter asserted – that investors were not provided documents related to the Beltramo Action. As such, it violates the hearsay rule, and there is no applicable exception here. This statement is not relevant to the issue of whether Barsky breached the Lodgepole Settlement Agreement and whether Lodgepole was damaged as a result.

Ruling: Objections overruled. With respect to FRE 1002, Lodgepole is not attempting to prove the contents of the written discovery responses within the meaning of FRE 1002; Lodgepole is instead attempting to prove that it did not provide any of its investors any documents related to the Beltramo Action. *See* Advisory Committee Notes to FRE 1002 ("Application of the rule requires a resolution of the question of whether contends are sought to be proved. Thus an event may be proved by nondocumentary evidence, *even though a written record of it was made*…. For example, payment may be proved without producing the written receipt which was given") (emphasis added).

The testimony is relevant because it addresses whether Barsky's alleged unauthorized disclosures damaged Lodgepole by causing Lodgepole's investors to

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CONT... Edward Gennady Barsky **Chapter 11**

receive subpoenas demanding information that they did not possess. The issue of whether Lodgepole's investors were subjected to upsetting subpoenas is relevant to whether Lodgepole sustained damages.

The statement "none of the investors … has been provided any documents related to the Beltramo action" is not hearsay. The fact that Taylor testifies that this statement was reiterated in written discovery responses which have not been produced here does not transform the statement into hearsay.

20) **Decl. at ¶19, lines 11–12:** "As with the Beltramo Action, the 45 investors have no connection in any way to the Barsky Action and the cross-complaint is legally frivolous."
Barsky's Objection: *Lacks foundation (FRE 602), improper testimony of content of a document (FRE 1002), improper opinion (FRE 701, 702)*. There was no determination that the investors had no connection to the Beltramo Action. Taylor is improperly testifying to the contents of a writing in violation of Rule 1002 of the Federal Rules of Evidence.
Ruling: Objections overruled in part and sustained in part. The objection under FRE 1002 is sustained. However, the Supplemental Taylor Declaration has properly authenticated the Sanctions Order, which sets forth the state court's finding that the cross-complaint was frivolous. The Court will rely upon the Sanctions Order itself for what the document states.

The objections under FRE 602, 701, and 702 are overruled. Taylor testifies that she is the managing member of Lodgepole and personally knows many of Lodgepole's investors. Given her knowledge of Lodgepole's operations and Lodgepole's investors, Taylor may offer an opinion as to whether the investors had any connection to the Barsky Action.

21) **Decl. at ¶19, lines 12–15:** "The obvious purpose of the Barsky Parents' cross-complaint is to make the litigation, and various defamatory allegations made by the Barsky Parents against myself known to investors in order to embarrass me in the hope of forcing a settlement."
Barsky's Objection: *Lacks foundation (FRE 602), misleading and improper lay witness testimony* (FRE 701, 702). Taylor lays no foundation for her claimed knowledge of Barsky's parents' purpose for filing the cross-complaint. She does not identify any of the allegedly "defamatory" statements because they are actually true.
Ruling: Objections overruled. In her capacity as a managing member of

Lodgepole, Taylor may opine as to the purpose of the Barsky Parent's litigation against Lodgepole.

22) **Decl. at ¶22, lines 25–26:** "As noted in paragraph 2 of this Declaration, the Lodgepole Entities strictly maintain the privacy of their investors' identities and addresses."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Taylor's statement is demonstrably false and misleading as shown by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled, for the reasons set forth in ¶1, above.

23) **Decl. at ¶22, line 26:** "Never during the time that Barsky and I managed the Lodgepole Entities were the Barsky Parents ever authorized to receive or view any of our private and confidential information, including information about investors and borrowers."
Barsky's Objection: *Speculative and lacks foundation (FRE 602).* Taylor's statement is called into question by the fact that Lodgepole attached a document that identifies one of its investors, Stephen E. Taylor, as Exhibit A to the Declaration of Richard Bowles in support of Lodgepole Entities' motion (this same document was previously attached to Lodgepole's Request for Judicial Notice in this Court).
Ruling: Objection overruled, for the reasons set forth in ¶1, above.

24) **Decl. at ¶22, lines 1–4:** "If they received any such information, it could only have been as a result of Barsky breaching his obligations to the Lodgepole Entities and their respective investors. The Barsky Parents were well aware that the information they were receiving from Barsky was confidential and not to be used."
Barsky's Objection: *Speculative and lacks foundation (FRE 602); improper opinion and legal conclusion (FRE 701, 702).* There has not been any adjudication and it is not established that Barsky owes an ongoing fiduciary obligation to any of the investors of the Lodgepole Entities.
Taylor has no personal knowledge and lays no foundation for the unsubstantiated assertions that Barsky had to have been the source of the

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information or that Barsky's parents knew that the information was confidential and "not to be used."

Ruling: Objections overruled. Taylor's status as a managing member of Lodgepole provides adequate foundation for the testimony. The statement that Barsky breached his obligations to Lodgepole by disclosing confidential information is not an expert opinion within the meaning of FRE 702. As a managing member of Lodgepole, Taylor is qualified to offer her opinion that Barsky's disclosures violated his obligations to Lodgepole. Taylor may also offer the opinion that the Barsky Parents knew that any information they received from Barsky was confidential and not to be used.

25) **Decl. at ¶23, lines 5–7:** "The only person who could have provided the Barsky Parents and/or their attorneys with the internal documents of the Lodgepole Entities that they produced in their production of documents was their son, Barsky."

Barsky's Objection: *Speculative and lacks foundation (FRE 602); relevance (FRE 401, 402).* Lodgepole does not claim it was damaged by the production of documents by the Barsky Parents, and therefore, this statement is irrelevant.

Ruling: Objection overruled. The testimony goes to Lodgepole's allegation that Barsky had a pattern and practice of disclosing Lodgepole's confidential information.

Party Information

Debtor(s):

Edward Gennady Barsky	Represented By Howard S Levine Anastasija Snicarenko

Movant(s):

Lodgepole Fund No. 1, LLC	Represented By David B Shemano
Lodgepole Investments, LLC	Represented By David B Shemano

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2:15-22962 Michael McNulty **Chapter 11**

#5.00 HearingRE: [55] Motion for approval of chapter 11 disclosure statement

Docket 55

Tentative Ruling:

10/4/2016: For the reasons set forth below, GRANT Motion.

Pleadings Filed and Reviewed

- Disclosure Statement:
  - Individual Debtor's Chapter 11 Plan of Reorganization ("Plan") [Doc. No. 54]
  - Notice of Motion and Motion for Order Approving Individual Debtor's Disclosure Statement in Support of Debtor's Plan of Reorganization ("Disclosure Statement") [Doc. No. 55]
  - Individual Debtor's Disclosure Statement in Support of Plan of reorganization [Doc. No. 168]
  - Notice of Hearing on Approval of Disclosure Statement [Doc. No. 53]

Facts and Summary of Pleadings

On August 31, 2016, Michael McNulty ("Debtor") filed a Motion for Approval of the Debtor's Chapter 11 Disclosure Statement ("Motion"). Doc. No. 55. For the reasons set forth below, the Court GRANTS the Motion as containing "adequate information" within the meaning of 11 U.S.C. § 1125.

General Background

On August 18, 2015, the Debtor filed a Chapter 11 voluntary petition ("Petition"). Doc. No. 1. Since commencement, the Debtor has operated the case as a debtor-in-possession. The Debtor is a self-employed contractor and plumber working at a business called "Tara Plumbing and Heating." *Id.* The Debtor's major asset is real property located at 1110 E. Arcacia Avenue, El Segundo, CA 90245 ("Property"). On

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Schedule A of the Petition, the Debtor listed the fair market value of the Property at $876,000. Doc. No. 1. The Debtor rents out part of the Property, generating $2,400 per month in rental income. Disclosure Statement, Ex. A.

Disclosure Statement

Overall, the Disclosure Statement proposes to pay the administrative claims with cash on hand, to continue paying the mortgages over thirty years, and distribute 2% to the general unsecured creditors over a five period. The effective date of the Plan is fourteen days following the date of the order confirming the Plan ("Effective Date"). First, the Disclosure Statement outlines the administrative claim of the Debtor's attorney, Onyinye Anyama of the Anyama Law Firm, in the estimated amount of $6,000, with payment to be made on the Effective Date or soon thereafter. Michael McNulty Decl. ¶¶ 8-10.

Second, the Debtor's proofs of claims list the following tax claims: (1) Internal Revenue Service ("IRS") in the amount of $43,818.80 as of July 13, 2016 [Claim No. 7-2]; and (2) Franchise Tax Board ("FTB") in the amount of $14,806.81 as of July 28, 2016 [Claim No. 5-2]. The Disclosure Statement submits the total amount of priority tax claims at $54,541.39, which is less than the combined total of Claim Nos. 5-2 and 7-2. Disclosure Statement at 5. The Plan proposes to pay the IRS lien at 4% interest amortized in monthly payments of $989 over five years and to pay the FTB claim lien at 3.5% interest amortized in monthly payments of $240 over five years. *Id.*, Ex. A.

Next, the Debtor lists the following secured claims in Classes 5(a) and 5(b), respectively and in order of priority: (1) Specialized Loan Servicing ("Specialized") holds a secured claim in the amount of $614,245.82 and (2) AKT American Capital Corporation ("American") holds a secured claim in the amount of $79,900. Disclosure Statement, Michal McNulty Decl. ¶¶ 11-14.**[FN 1]** The Debtor's amended Schedule A ("Amended Schedule A"), attached as Exhibit "B" to the Disclosure Statement and amended for the purposes of the Disclosure Statement, puts the total amount of secured claims against the Property at $764,245.82 ("Secured Claims"). The Secured Claims are $70,100 more than the total of the Specialized and American liens. The Court is unclear where the difference comes from as the amounts are taken directly from the Debtor's declaration and the Amended Schedule A. The Plan proposes to pay Specialized a monthly installment of $2,933 calculated at a 4% interest rate with

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the first payment due on November 1, 2016 and the last payment due on November 1, 2046. Plan at 5. Additionally, the Plan proposes to pay American a monthly installment of $381.45 calculated at a 4% interest rate with the first payment due on November 1, 2016 and the last payment due on November 1, 2046. *Id.* at 6.

Thereafter, in class 6(b), the Debtor includes all other general unsecured claims ("General Unsecured Claims"). *Id.* Each member of class 6(b) will be paid 2% of its claim over five years in equal monthly installments due on the first of each month ("First Day"), starting on the First Day after the Effective Date. The Plan proposes to pay $19.31 per month to the General Unsecured Claims for five years following the Effective Date.

The Debtor intends to assume the unexpired month to month lease agreements for the Property with Richard and Scott Miller ("Tenants"). The Debtor intends to fund the Plan with $7,000 of available cash by the Effective Date and with additional cash from projected disposable income, attached as Exhibit "A" ("Budget Projection"). *Id.* The Budget Projection estimates a total of $35.50 per month of disposable income ("DMI") for the first six months of the Plan. The Debtor's DMI is based on a monthly income of $6,400 and monthly expense of $6,364.50. The monthly income consists of $4,000 per month in salary from the Debtor's employment and $2,400 in rental income generated from the Property. The monthly expense total includes, among other things, the two mortgages of Specialized and American, property insurance and taxes, utility bills, food, transportation, and the U.S. Trustee's fees. By subtracting the $19.31 per month distribution of the General Unsecured Claims in class 6(b), the Debtor retains a net income of $16.19 per month under the Budget Projection.

The Debtor's liquidation analysis reflects that the Plan would result in a 2% pro rata distribution to unsecured creditors as opposed to a 0% pro rata distribution under a chapter 7 liquidation. Disclosure Statement at 5. Regarding feasibility, the Plan proposes to use the $7,000 of the Debtor's cash on hand to pay the estimated $6,000 in administrative fees to the Debtor's attorney by the Effective Date or soon thereafter. *Id.* Finally, the Debtor states that the risks associated with the Plan concern the rental agreements. *Id.* The Debtor represents that the Tenants may refuse to renew their tenancy resulting in a lapse in time before the Debtor could obtain new tenants. Additionally, the Debtor admits that the Tenants may default on the rent.

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Findings of Fact and Conclusions of Law

Section 1125 requires a disclosure statement to contain "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable. . . a hypothetical investor of the relevant class to make an informed judgment about the plan." In determining whether a disclosure statement provides adequate information, "the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information." 11 U.S.C. § 1125(a). Courts interpreting § 1125 (a) have explained that the "primary purpose of a disclosure statement is to give the creditors the information they need to decide whether to accept the plan." *In re Monnier Bros.*, 755 F.2d 1336, 1342 (8th Cir. 1985). "According to the legislative history, the parameters of what constitutes adequate information are intended to be flexible." *In re Diversified Investors Fund XVII*, 91 B.R. 559, 560 (Bankr. C.D. Cal. 1988). "Adequate information will be determined by the facts and circumstances of each case." *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988), *accord. In re Ariz. Fast Foods, Inc.*, 299 B.R. 589 (Bankr. D. Ariz. 2003).

> Relevant factors for evaluating the adequacy of a disclosure statement may include: (1) the events which led to the filing of a bankruptcy petition; (2) a description of the available assets and their value; (3) the anticipated future of the company; (4) the source of information stated in the disclosure statement; (5) a disclaimer; (6) the present condition of the debtor while in Chapter 11; (7) the scheduled claims; (8) the estimated return to creditors under a Chapter 7 liquidation; (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (10) the future management of the debtor; (11) the Chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the collectability of accounts receivable; (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant to the risks posed to creditors under the plan; (16) the actual or projected realizable value from

recovery of preferential or otherwise voidable transfers; (17) litigation likely to arise in a nonbankruptcy context; (18) tax attributes of the debtor; and (19) the relationship of the debtor with affiliates.

In re Metrocraft Pub. Services, Inc., 39 B.R. 567, 568 (Bankr. Ga. 1984). However, "[d]isclosure of all factors is not necessary in every case." *Id.*

Here, the Court finds that the Disclosure Statement satisfies many relevant *Metrocraft* factors, including: (1) the events which led to the filing of a bankruptcy petition; (2) a description of the available assets and their value; (4) the source of information stated in the disclosure statement; (7) the scheduled claims; (8) the estimated return to creditors under a Chapter 7 liquidation; (11) the Chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant to the risks posed to creditors under the plan; and (18) tax attributes of the debtor.

Although the following are plan confirmation issues, the Debtor should be aware that the Plan in its present form cannot be confirmed over the opposition of the class of general unsecured creditors. In applying § 1129(b)(2)(B), this Court follows the approach set forth in *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. 2012). Under the *Arnold* approach, debtors may not retain any pre-petition property under the Plan in order for the Plan to be confirmed over the dissent of a class of unsecured creditors. Here, the Plan provides for the Debtor to retain the Property.

In addition, § 1129(a)(15) gives any single unsecured creditor the power to block confirmation where the Plan does not pay them the present value of their claims or distribute property equal to the Debtor's projected monthly disposable income. Here, each of these creditors shall be paid 2% of its claim over five years in equal monthly installments without interest. Unsecured creditors may seek to challenge the Debtor's projections of disposable income, potentially creating an additional obstacle to confirmation.

Finally, the Court finds that the proposed plan does not per se violate the best interests of the creditors test. Under a liquidation analysis, $876,000 (fair market

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value of the Property) – [$764,245.82 (secured claims against the Property) + $59,541.39 (administrative and priority tax claims) + $70,080 (estimated cost of sale at 8%)] = -$17,867.21. Additionally, this Court's calculation does not even include the chapter 7 trustee's costs to administer liquidation. Thus, the Debtor's liquidation analysis does not necessarily violate 11 U.S.C. § 1129(a)(7)(A).

Base on the foregoing, the Court APPROVES the Disclosure Statement as containing "adequate information" within the meaning of 11 U.S.C. § 1125.

The Debtor shall lodge a conforming proposed order within 7 days of the hearing.

The following dates with respect to plan confirmation apply:

1. A hearing will be held on the confirmation of the Debtor's Chapter 11 Plan on January 4, 2017 at 10:00 a.m.

2. In accordance with FRBP 3017(a), the Disclosure Statement, the Plan, a notice of hearing on confirmation of the Plan, and if applicable, a ballot conforming to Official Form No. 14, shall be mailed to all creditors, equity security holders and to the Office of the United States Trustee, pursuant to FRBP 3017(d), on or before **October 14, 2016.**

3. November 19, 2016 is fixed as the last day for creditors and equity security holders to return Debtor's counsel ballots containing written acceptances or rejections of the Plan, which ballots must be actually received by Debtor's counsel by 5:00 p.m. on such date.

4**.** December 5, 2016 is fixed as the last day on which the Debtor must file and serve a motion for an order confirming the Plan ("Confirmation Motion") including declarations setting forth a tally of the ballots cast with respect to the Plan ("Ballots"), and attaching thereto the original Ballots, and setting forth evidence that the Debtor has complied with all the requirements for the confirmation of the Plan as set forth in § 1129 of the Bankruptcy Code.

5. December 19, 2016 is fixed as the last day for filing and serving written objections to confirmation of the Plan, as provided in Rule 3020(b)(1) of the Federal Rules of

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Bankruptcy Procedure (the "Objection Date").

6. December 28, 2016 is fixed as the last day on which the Debtor may file and serve its reply to any opposition to the Confirmation Motion ("Reply").

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Nathaniel Reinhardt or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1: The Debtor lists two secured claims against the Property in Class 5 of the Plan. The Plan uses form "F 2081-1.PLAN" and specifically describes Class 5 as "property ***other than*** the debtor's principal residence in which the Debtor has an interest…" Plan at 5. Yet, on the Debtor's "Schedule A – Real Property" the Debtor lists the Property as "Debtor's real property / primary residence located at…" Doc. No. 1. Under § 1122(a), a debtor of a proposed plan, "may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." Here, the error seems harmless in the context of a disclosure statement motion and, moreover, both lienholders on the Property are placed in the same class.

Party Information

Debtor(s):

Michael McNulty — Represented By
Onyinye N Anyama

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

10:00 AM
2:13-12277 Edward Gennady Barsky **Chapter 11**

#6.00 HearingRE: [205] Motion Notice Of Motion And Motion By Former Debtor Gennady Barsky For An Order Granting Injunctive Relief And Momentary Sanctions Under Bankruptcy Code Section 105 (a) And Under Inherent Sanctioning Powers Against Lodgepole Investments, LLC, Lodgepole Fund No. 1, LLC, Margaret Taylor, And Brenna Daugherty; Declarations Of Gennady Barsky, Hyura E. Choi, William M. Weintraub, And Laura Premi (Levine, Howard)

Docket 205

Tentative Ruling:

10/4/2016: For the reasons set forth below, the Motion is DENIED.

Pleadings Filed and Reviewed:

1) Notice of Motion and Motion by Former Debtor Gennady Barsky for an Order Granting Injunctive Relief and Monetary Sanctions Under Bankruptcy Code §105 (a) and Under Inherent Sanctioning Powers Against Lodgepole Investments, LLC, Lodgepole Fund No. I, LLC, Margaret Taylor, and Brenna Daughtery ("Motion") [Doc. No. 205]
   a) Request for Judicial Notice in Support of Motion [Doc. No. 206]
2) Opposition to Gennady Barsky's Motion for Sanctions and Other Relief ("Opposition") [Doc. No. 210]
   a) Declaration of Margaret L. Taylor in Support of Opposition [Doc. No. 211]
   b) Joinder of Brenna Daughtery and Margaret L. Taylor in the Lodgepole Entities' Opposition to Former Debtor Gennady Barsky's Motion for an Order Granting Injunctive Relief and Other Relief [Doc. No. 213]
   c) Amended Declaration of Margaret L. Taylor in Support of Opposition [Doc. No. 216]
3) Reply in Support of Former Debtor Gennady Barsky for an Order Granting Injunctive Relief and Monetary Sanctions Under Bankruptcy Code §105(a) and Under Inherent Sanctioning Powers Against Lodgepole Investments, LLC, Lodgepole Fund No. I, LLC, Margaret Taylor, and Brenna Daughtery ("Reply") [Doc. No. 218]

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CONT... Edward Gennady Barsky **Chapter 11**

I. Facts and Summary of Pleadings

At the outset, the Court notes that there is substantial overlap between the facts relevant to this Motion and the facts relevant to Lodgepole's motion for sanctions against Barsky (Cal. No. 3). This tentative ruling assumes familiarity with Cal. No. 3, and certain facts are not repeated.

Barsky's Chapter 11 Petition

On January 28, 2013, Barsky and his affiliate, St. Tropez Capital, LLC ("St. Tropez") commenced voluntary Chapter 11 petitions. On January 31, 2013, Lodgepole Investments, LLC ("Lodgepole") filed an action in the United States District Court for the Northern District of California (Case No. C13-0446-NC) (the "District Court Action") against Barsky and his two companies, St. Tropez and Monaco Development, LLC ("Monaco"). The District Court Action alleged that Barsky had misappropriated at least $11.9 million from Lodgepole. On May 30, 2013, Lodgepole filed a proof of claim in Barsky's Chapter 11 case in the amount of $13 million. On the same date, Margaret "Peggy" Taylor ("Taylor"), a managing member of Lodgepole, filed a proof of claim against Barsky in the amount of $1,705,436.04. On June 13, 2013, Lodgepole filed a proof of claim against St. Tropez in the amount of $13 million.

The Settlement Agreement

On September 20, 2013, Barsky, Barsky's ex-wife, St. Tropez, and Lodgepole entered into a settlement agreement (the "Settlement Agreement"). In exchange for dismissing the District Court Action with prejudice and withdrawing the proofs of claim filed in the Barsky and St. Tropez cases with prejudice, Lodgepole received interests in several parcels of real property, cash from the sale proceeds of another real property, and a diamond ring. Settlement Agreement at ¶¶ 5–8.

The Settlement Agreement contained Recitals reflecting the fact that the parties disputed liability (Barsky is referred to as "Gennady" in the agreement):

> The Lodgepole Entities and Taylor assert certain claims and causes of action against Gennady [Barsky], … St. Tropez[,] and Monaco relating to and including the transfer of moneys from the Lodgepole Entities to or for the benefit of Gennady, … St. Tropez[,] and Monaco (collectively, the "Transfers"). Among other things (but not exclusively), the Lodgepole Entities and Taylor claim that they hold valid and enforceable notes secured by deeds of trust against real properties owned by St. Tropez, Monaco[,] and Gennady….

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In addition to the claims secured by real properties, the Lodgepole Entities and Taylor have claimed, among other things, that Gennady improperly took additional funds from the Lodgepole Entities and that Gennady used such funds for personal and family expenses and acquisitions….

[Barsky] … and St. Tropez have disputed, and continue to dispute, the allegations by the Lodgepole Entities and Taylor of wrongdoing in connection with the Transfers and continue to dispute the amounts, validity and enforceability of any and all claims and causes of action of Taylor and the Lodgepole Entities against them individually, or against any of their respective property assets ….

Settlement Agreement at ¶¶J, K.

The Settlement Agreement contained a mutual general release ("Release Provision"):

For and in consideration of the terms set forth herein, the Parties hereby irrevocably and unconditionally release and forever release and discharge each other and each of the Parties' respective current and former officers, managers, board members, directors, employees, members, attorneys, representatives, insurers, predecessors and successors in interest from any and all manner of past, present or future actions or causes of actions, liens, encumbrances, deeds of trust, promissory notes, claims, damages, obligations, liabilities, debts, accounts, judgments, demands, costs and expenses (including fees and costs of attorneys and experts) of every kind and description whatsoever, whether known or unknown, suspected or unsuspected, fixed or contingent, arising out of or in any way related directly or indirectly to any acts, omissions or transactions described in the Recitals hereto and any claim related to the value of the condition of any of the real or personal property or interests to be transferred to Lodgepole pursuant to this Agreement; provided, however, that this release does not release any claims, liabilities, obligations, or causes of action (1) arising from any Party's failure to comply with this Agreement, (2) expressly reserved by this Agreement, including all rights and claims asserted by Taylor in the Taylor Proof of Claim and al rights of the Lodgepole Entities and Taylor to seek an Accounting, and (3) any and all claims between Gennady and Nellie.

The Lodgepole Entities agree and acknowledge that upon Closing, no indebtedness or obligations is or will be owed to them by St. Tropez and/or Nellie. The Lodgepole Entities agree that based on information currently available, the Lodgepole Entities do not expect to issue any tax documents,

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including a Form 1099, to Nellie and/or St. Tropez ... The Lodgepole Entities further agree that any Form 1099 to be issued to Gennady shall be issued to him prior to December 31, 2013, unless otherwise agreed by Gennady and the Lodgepole Entities.

Settlement Agreement at ¶10.

The Settlement Agreement contained a waiver of the right to pursue unknown claims (the "Waiver"):

> The Parties acknowledge that they have investigated to their complete satisfaction all facts and potential claims which they may have against each other and that there is a risk that after the execution of this Agreement they will discover, incur, or suffer claims which were unknown or unanticipated at the time this Agreement is executed, and if which known on the date of execution and delivery, may have materially affected their decision to execute this Agreement.
>
> The Parties acknowledge and agree that the reason of the mutual release is contained above, they are assuming the risk of such unknown claims, and agree that this Agreement applies thereto. In connection herewith, the Parties expressly waive and relinquish eh benefits of section 1542 of the California Civil Code ….

Settlement Agreement at ¶11.

Finally, the Settlement Agreement contained a nondisparagement provision (the "Nondisparagement Provision"):

> The Parties agree not to disparage any of the other Parties and shall refrain from using inflammatory language and making unsubstantiated accusations of fraud, dishonesty, or wrong-doing against each other, … in any further communications or documents filed in connection with any judicial, quasi-judicial, equitable, administrative, or regulatory proceedings of any nature.

Settlement Agreement at ¶13.

On October 24, 2013, the Court approved the Settlement Agreement. The order approving the Settlement Agreement provides in part: "The Settlement Agreements are APPROVED, and shall be enforceable against all parties thereto." *See* Doc. No. 99. On April 25, 2014, the Court entered an order granting the Debtor's motion to dismiss the case ("Dismissal Order") [Doc. No. 167]. The Dismissal Order provides: "The Court shall retain jurisdiction with respect to the following limited matters: … overseeing and entering orders as may be necessary to enforce the terms of the Lodgepole Settlement."

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Summary of Barsky's Motion for Sanctions Against Lodgepole

Barsky contends that Lodgepole has violated the Settlement Agreement, and seeks sanctions and injunctive relief. Barsky makes the following arguments in support of the Motion:

Lodgepole Violated the Settlement Agreement by Attributing a Theft Loss of Approximately $4 Million to Barsky in its Amended 2012 Tax Return

On September 20, 2013, the same day that the Settlement Agreement was executed, Lodgepole filed an Amended 2012 Tax Return ("2012 Return"). The 2012 Return claims a "theft/casualty loss of $3,983,604 during the 2012 tax year." 2012 Return (Barsky Decl. at Ex. 3). The 2012 Return states that Barsky is the "party involved in embezzlement, fraud and theft," and lists Lodgepole's managing member, Margaret Taylor, as the LLC member that incurred the loss. *Id.*

On December 31, 2013, Lodgepole issued a Form 1099 to Barsky. Lodgepole's attorney Brenna Daughtery stated the reason for issuance of the form 1099:

> On advice of Lodgepole Investments' tax attorney and CPA, the company reported a theft loss of roughly $3.5 million for 2012 related to the money embezzled by Gennady [Barsky]. Our tax attorney and CPA further advised that a theft loss to Lodgepole Investments constituted an ordinary income for Gennady [Barsky]; and therefore, Lodgepole Investments was required to issue him a 1099.

E-mail dated January 8, 2014, from Brenna Daughtery to Leonard Coniff (Barsky Decl., Ex. 4).

The theft loss reported by Lodgepole was the difference between what Lodgepole received in the Lodgepole Settlement Agreement and the amount that Lodgepole contended was embezzled by Barsky.

On September 14, 2015, the California Franchise Tax Board ("CFTB") initiated an audit of Barsky. Upon conclusion of the audit, CFTB determined that Barsky owed taxes of $332,593 on account of the theft loss income reported by Lodgepole. Barsky has incurred $15,202.12 in attorneys' fees in connection with the audit, and anticipates incurring an additional $125,000 in attorneys' fees appealing the CFTB's determination of his tax liability.

Lodgepole's issuance of the theft-loss Form 1099 was a violation of the Settlement Agreement. To comply with the Settlement Agreement, Lodgepole should have issued Barsky a Cancellation of Debt Form 1099. The Settlement Agreement contains recitals stating that Barsky disputed Lodgepole's claims against him. Consistent with those recitals, and pursuant to the contested liability doctrine,

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Lodgepole should not have reported the theft loss as income to Barsky:

> Under the contested liability doctrine, if a taxpayer, in good faith, disputed the amount of a debt, a subsequent settlement of the dispute would be treated as the amount of debt cognizable for tax purposes. The excess of the original debt over the amount determined to have been due is disregarded for both loss and debt accounting purposes. The law thus accepts the parties' fixing of the amount of the debt and treats the greater asserted amount as a nullity.

J.H. McKnight Ranch, Inc. v. Franchise Tax Bd., 110 Cal. App. 4th 978, 985 (2003).

Lodgepole issued the theft-loss Form 1099 to Barsky for the purpose of causing him adverse tax consequences. Lodgepole's actions were a violation of the Settlement Agreement's Release Provision, in which the parties agreed to release each other of any and all future claims. Lodgepole's assertion that Barsky embezzled funds was a claim against Barsky within the meaning of the Release Provision. Lodgepole's actions also violated the Settlement Agreement's Nondisparagement Provision, which provides that the parties "shall refrain from using inflammatory language and making unsubstantiated accusations of fraud, dishonesty, or wrong-doing against each other, … in any further communications or documents filed in connection with any judicial, quasi-judicial, equitable, administrative, or regulatory proceedings of any nature."

Had Barsky known that Lodgepole would issue the theft-loss Form 1099, he would not have entered into the Settlement Agreement. Although the Settlement Agreement provided that Lodgepole was to issue Barsky a Form 1099 subsequent to execution of the agreement, an interpretation of the agreement under which Lodgepole was permitted to issue a theft-loss Form 1099 to Barsky would be absurd. The Nondisparagement and Release Provisions were at the heart of the Settlement Agreement. The parties identified exceptions to the Release Provision; those exceptions did not include a provision permitting Lodgepole to assert a theft claim against the Debtor on its tax returns.

Lodgepole should be required to pay Barsky $472,794.12 in civil compensatory contempt sanctions for this breach of the Settlement Agreement (consisting of $332,595 in additional taxes assessed against Barsky as a result of Lodgepole's issuance of the Form 1099, $15,202.12 in attorneys' fees incurred in connection with the audit, and $125,000 in future attorneys' fees that will be incurred appealing the results of the audit). Lodgepole must be ordered to amend the 2012 Return and to withdraw the theft-loss Form 1099.

The Court may also award sanctions against Lodgepole under its inherent authority, based upon the determination that Lodgepole was motivated by vindictiveness in issuing the theft-less Form 1099. *See Fink v. Gomez*, 239 F.3d 989,

992 (9th Cir. 2001) ("sanctions are justified when a party acts *for an improper purpose*—even if the act consists of making a truthful statement or a non-frivolous argument or objection").

Lodgepole Violated the Settlement Agreement by Suing Barsky's Family and Accountant

Lodgepole violated the Settlement Agreement by commencing three state court actions: *Lodgepole v. Leonard Coniff* (the "Coniff Action"), *Lodgepole v. Paul Barsky* (the "Paul Barsky Action"), and *Lodgepole v. Vladimir and Rozaliya Kats* (the "Kats Action"). Lodgepole's prosecution of these actions violate the Settlement Agreement's Release and Nondisparagement Provisions.

Kats Action

In the Kats Action, Lodgepole alleges that the Kats (Barsky's parents) were unjustly enriched as a result of receiving funds that Barsky had embezzled from Lodgepole. The Kats Action is therefore an attempt to relitigate Barsky's liability for embezzlement—a claim that Lodgepole released in the Settlement Agreement. The Kats Action also violates the Settlement Agreement's Nondisparagement Provision, because Lodgepole repeats inflammatory and unsubstantiated allegations of wrongdoing against Barsky in the litigation. Taylor and Daughtery have filed a number of documents in the Kats Action containing disparaging allegations against Barsky. Lodgepole has also engaged in bad-faith litigation tactics, including:

1) Recording an improper lis pendens against the Kats' home in an attempt to coerce a settlement;
2) Filing false papers claiming to have served a deposition subpoena on Barsky in Florida, which required Barsky to file an emergency motion to quash the subpoena; and
3) Asking Barsky invasive questions in a deposition.

Lodgepole must be ordered to dismiss the Kats Action with prejudice and enjoined from further violating the Nondisparagement Provision. Barsky has incurred $833,719.29 to fight the claims of wrongdoing against him in the Kats Action. Lodgepole, Taylor, and Daughtery should be held jointly and severally liable for this amount.

An additional basis for injunctive relief is the fact that the Settlement Agreement released all claims against Barsky's "members" and "successors in interest," which should be interpreted to include Barsky's family members. Barsky's parents are also "successors in interest" to Barsky since they received the money that Barsky allegedly

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embezzled from Lodgepole.

Paul Barsky Action

On October 31, 2014, Lodgepole filed an action against Barsky's brother, Paul Barsky. The Paul Barsky Action alleged that Paul Barsky conspired with Barsky to embezzle funds from Lodgepole. Based on diversity, Paul Barsky removed the action to the United States District Court for the Northern District of California.

The District Court granted Paul Barsky's motion to dismiss. The District Court found that Lodgepole was barred from maintaining the action against Paul Barsky because of the *res judicata* effect of Lodgepole's previous action against Barsky.

The Paul Barsky Action violated the Settlement Agreement's Nondisparagement Provision, because Lodgepole made unsubstantiated accusations of wrongdoing against Barsky. The action also violated the Release Provision, because it was a further attempt to relitigate Barsky's liability for embezzlement. Barsky paid his brother's legal expenses, in the total amount of $54,145.99. Lodgepole should be required to pay Barsky this amount in civil compensatory contempt sanctions.

Coniff Action

On December 31, 2013, Lodgepole filed an action against its former accountant, Leonard Coniff. The Coniff Action breached the Nondisparagement Provision by alleging that Coniff conspired with Barsky to facilitate Barsky's embezzlement of funds from Lodgepole. In the Coniff Action, Lodgepole issued an overbroad subpoena seeking the following financial information from Barsky:

> All records/documents/files referencing requests for loans or financing by Edward "Gennady" Barsky between 1/1/2009-12/31/2012, including but not limited to loan applications and files, refinancing requests, underwriting investigation, and documentation of income from any source.

Premi Decl. at Ex. 1.

The discovery referee quashed the subpoenas, except with respect to communications to and from or prepared by Coniff. Lodgepole subsequently withdrew the subpoenas. Barsky incurred $36,316.54 in attorneys' fees and costs to quash the subpoenas—an amount which Lodgepole should be required to pay in civil compensatory contempt sanctions.

Summary of Lodgepole's Opposition

Lodgepole makes the following arguments in opposition to the Motion (Taylor and Daughtery join Lodgepole's Opposition):

Lodgepole Did Not Violate the Settlement Agreement by Issuing the Form 1099

Lodgepole's issuance of the Form 1099 did not violate the Settlement Agreement. Nothing in the Settlement Agreement required Lodgepole to characterize the tax consequences of the agreement in a way favorable to Barsky. The Settlement Agreement contains a specific provision disclosing that Lodgepole would be issuing a Form 1099, and that provision does not in any way address the content of the Form 1099. The issuance of the Form 1099 was extensively discussed during the negotiations of the Settlement Agreement, and Lodgepole explicitly rejected language proposed by Barsky that would have prohibited Lodgepole from issuing a Form 1099 that reported income on account of debt cancellation. Lodgepole insisted that the Settlement Agreement be neutral regarding the content of the Form 1099, and Barsky agreed. *See* September 3, 2013 E-mail from Lodgepole's Counsel to Barsky's Counsel (Opposition at Ex. B) ("With respect to the tax issue, after considerable time spent with our tax counsel, we have concluded that there is no practical alternative other than to leave the agreement entirely tax neutral."); Redlined Settlement Agreement (deleting language providing that "Lodgepole shall, for purpose of the preparation and filing of tax returns, report the Transfers as the incurrence of a debt by the recipient [Barsky] and not payment or distribution of income.").

The content of the Form 1099 was subsequently addressed several months later in a second settlement agreement executed between Barsky, Taylor, and others in 2014 (the "Taylor Settlement Agreement"):

> The Debtor acknowledges that Lodgepole has provided to the Debtor supporting documentation for the Form 1099 that it issued to the Debtor for 2012. If the Debtor successfully challenges the characterization of information reported in the 2012 Form 1099 to the Internal Revenue Service, nothing in this Agreement releases Lodgepole from its obligation to recharacterize information as determined by the Internal Revenue Service.

Taylor Settlement Agreement at ¶14.

The Taylor Settlement Agreement evidences that the parties considered and resolved all issues regarding the Form 1099 in 2014. Barsky's attempt to relitigate the issue should not be permitted. Because Barsky has been aware of the issue since 2013, but waited until 2016 to request relief from this Court after incurring legal expenses for which he now seeks reimbursement, the doctrine of laches now bars any requested relief.

Finally, Barsky is barred from obtaining any recovery in connection with Lodgepole's issuance of the Form 1099 or its tax returns under the doctrine of

unclean hands. Barsky fraudulently obtained a copy of the tax return by misrepresenting to the IRS that he was still affiliated with Lodgepole after he had resigned.

Lodgepole Did Not Violate the Settlement Agreement by Suing Barsky's Family and Accountant

Lodgepole did not violate the Settlement Agreement's Nondisparagement Provision in the Kats Action, Coniff Action, and Paul Barsky Action. All of the allegations made against Barsky in those actions were substantiated. The Nondisparagement Provision prohibits only "unsubstantiated" allegations of wrongdoing. To the extent Barsky contends the allegations are not substantiated, the Court will be required to conduct a trial on the allegations to determine whether Barsky can satisfy his burden of proof.

Lodgepole's prosecution of the actions did not violate the Settlement Agreement's Release Provision. First, Barsky was not named as a defendant in any of the third-party actions. He therefore lacks standing to assert that those actions violated the Settlement Agreement. If any of the defendants believe that claims against them were released by the Settlement Agreement, they are the parties who should seek relief. Second, in the Kats Action, the claim that the Settlement Agreement released the Kats was raised and rejected. Under the *Rooker-Feldman* doctrine, the Bankruptcy Court may not revisit an issue already decided upon by the state court. Third, even if the *Rooker-Feldman* doctrine does not apply, there is no colorable argument that direct claims against third parties are covered by the Release Provision. Barsky's contention that the terms "members" and "successors in interest" covers his family members is frivolous. In addition, during negotiation of the Settlement Agreement the parties discussed whether the Barsky's family members should be included within the scope of the release. The final version of the Settlement Agreement omitted previously negotiated language covering Barsky's family members.

Barsky is not entitled to seek reimbursement from Lodgepole of attorneys' fees that he voluntarily paid on behalf of Paul Barsky and his parents. Barsky may have felt morally obligated to pay attorneys' fees on behalf of his family members, but he was under no legal obligation to do so. *See Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 21 Cal.App. 4th 1586, 1598 (1994) ("Since Fireman's payment was as a volunteer, equitable subrogation is unavailable."). Furthermore, the doctrine of laches should apply. If Barsky believes the Settlement Agreement barred litigation against his brothers and parents, he should have presented this argument at the commencement of the litigation in 2014, instead of waiting until after he incurred

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exorbitant legal fees.

The Anti-Injunction Act Prevents the Court from Enjoining the Kats Action

The Court lacks the power to enjoin the Kats Action, as requested by Barsky. Under the Anti-Injunction Act, federal courts are prohibited from enjoining a state court proceeding "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. §2283. While a bankruptcy court may enjoin litigation that threatens the integrity of the bankruptcy estate, here no plan was confirmed and the case has been dismissed, so the bankruptcy exception does not apply. The Court may not enjoin the Kats Action to protect or effectuate the Settlement Agreement, because the Settlement Agreement does not contain an injunctive provision. The Court may enjoin state court proceedings that relitigate issues actually decided in a federal proceeding, but the relitigation exception does not apply. No claim held by Lodgepole against Barsky, let alone his parents, was ever litigated in the Bankruptcy Court.

Summary of Lodgepole's Reply to Barsky's Opposition

Lodgepole makes the following arguments in its Reply to Barsky's Opposition:

Lodgepole's Interpretation of the Nondisparagement Provision is Absurd

The relentless disparagement of Barsky by Lodgepole, Taylor, and Daugherty is so egregiously contrary to the intent of the parties that it leads to the inescapable conclusion that a contract was never formed due to lack of mutual assent. Should the Court conclude there was no meeting of the minds on the Nondisparagement Provision, Barsky reserves the right to seek rescission of the Settlement Agreement.

Lodgepole's contention that its allegations did not violate the Nondisparagement Provision because they were substantiated negates the purpose of the Nondisparagement Provision, and is an absurd construction of that provision. Barsky settled with Lodgepole, Taylor, and Daughtery so they would stop accusing him of fraud and theft. If Lodgepole's interpretation of the Nondisparagement Provision is accepted, Barsky would have entered into the Settlement Agreement for naught.

The Unclean Hands Doctrine Does Not Apply

There is no merit to Lodgepole's contention that Barsky has unclean hands because he fraudulently obtained a copy of Lodgepole's amended 2012 tax return. Barsky was able to obtain a copy of the return because Lodgepole Investments had listed him on its tax return as a 50% partner through the entire year 2012. Otherwise,

the IRS would never have sent Barsky a copy of the return.

The Taylor Settlement Agreement Does Not Show that the Parties Resolved All Issues Regarding the Form 1099 in 2014

The Taylor Settlement Agreement provides that "[i]f the Debtor successfully challenges the characterization of information reported in the 2012 Form 1099 to the Internal Revenue Service, nothing in this Agreement releases Lodgepole from its obligation to recharacterize information as determined by the Internal Revenue Service." This language does not show that Barsky acquiesced to Lodgepole's reporting of the theft loss.

Barsky Has Standing

Barsky has standing because he suffered an injury—he paid the legal expenses to defend his brother and parents against Lodgepole's actions. Barsky's injury was caused by Lodgepole's conduct, and can be redressed by a favorable decision.

The Anti-Injunction Act Does Not Prevent the Court from Enjoining the Kats Action

There is no merit to Lodgepole's argument that the Anti-Injunction Act prevents the Court from enjoining the Kats Action. This Court retains exclusive jurisdiction over the Settlement Agreement. The Court may enjoin a state court proceeding "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. §2283. Both exceptions apply here. Enjoining the Kats Action is necessary to ensure that the terms of the Settlement Agreement are enforced.

Lodgepole's contention that the relitigation exception to the Anti-Injunction Act does not apply is incorrect. "[T]he relitigation exception is 'founded in the well-recognized concepts of *res judicata* and collateral estoppel.'" *Western Systems, Inc. v. Ulloa*, 958 F.2d 864, 870–71 (9th Cir. 1992). *Res judicata* bars claims that could have been presented. Therefore, the relitigation exception applies to claims that were actually litigated as well as claims that could have been litigated. The religitation exception applies here because Lodgepole's claims against the Kats could have been presented in the District Court Action that Lodgepole filed against Barsky. Presented with a similar situation in the Paul Barsky Action, the District Court for the Northern District of California correctly concluded that *res judicata* barred the action. In concluding that *res judicata* did not apply, the state court in the Kats Action misapplied the law. Had the Kats Action been removable to a federal court like the Paul Barsky Action, the federal court would have correctly determined that the action was barred by *res judicata*.

The Rooker-Feldman Doctrine Does Not Prevent this Court from Finding that the Kats Action Violated the Settlement Agreement

Although the state court erroneously concluded that the Kats Action was not barred by the Settlement Agreement, the *Rooker-Feldman* doctrine does not prevent this Court from finding that the Settlement Agreement does bar the Kats Action. The *Rooker-Feldman* doctrine "does not bar actions by nonparties to the earlier state court-judgment simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment." *Lopez v. Emergency Serv. Restoration, Inc.*, 367 B.R. 99, 104 (BAP 9th Cir. 2007). Barsky was not named in the Kats Action. The mere fact that he could be considered in privity with his parents does not trigger the *Rooker-Feldman* bar.

Equitable Subrogation Does Not Apply

Contrary to Lodgepole's argument, the doctrine of equitable subrogation does not prevent Barsky from seeking to recover damages from Lodgepole. "Equitable subrogation permits a party who has been required to satisfy a loss created by a third party's wrongful act to 'step into the shoes' of the loser and pursue recovery from the responsible wrongdoer. In the insurance context, the doctrine permits the paying insurer to be placed in the shoes of the insured and to pursue recovery from third parties responsible to the insured for the loss for which the insurer was liable and paid." *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 21 Cal. App. 4th 1586, 1595–96 (1994). Barsky is not seeking reimbursement from Lodgepole on the theory that Lodgepole should have paid the legal expenses of Barsky's parents and his brother. Unlike the insured in *Fireman*, neither the brother nor the parents are in the position of having suffered a loss as a result of Lodgepole's tortious conduct. Simply suing someone is not a tort that entities to the defendant to recover fees under an equitable subrogation theory.

Laches Does Not Bar the Requested Relief

A party asserting the defense of laches must show that he or she was prejudiced by the delay. "The affirmative defense of laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1126 (9th Cir. 2006). Lodgepole, Taylor, and Daughtery have not shown any prejudice. Further, they have not shown unreasonable delay. Lodgepole's action against Paul Barsky was concluded only in March 2015. The CFTB did not commence its audit until

September 2015. It was reasonable for Barsky to first seek relief from the CFTB before coming to the Bankruptcy Court.

II. Findings and Conclusions

The Court Has Ancillary Jurisdiction to Enforce the Settlement Agreement

Although Barsky's bankruptcy case has been dismissed, the Court retains ancillary jurisdiction to enforce the Settlement Agreement. "Ancillary jurisdiction may rest on one of two bases: (1) to permit disposition by a single court of factually interdependent claims, and (2) to enable a court to vindicate its authority and effectuate its decrees." *Sea Hawk Seafoods, Inc. v. Alaska (In re Valdez Fisheries Dev. Ass'n, Inc.)*, 439 F.3d 545, 549 (9th Cir. 2006). Only the second basis is relevant in this case.

Ancillary jurisdiction has been found where a dismissal order incorporates the terms of a settlement agreement or contains a provision retaining jurisdiction. *See, e.g.*, *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016) ("When a court's order dismissing a case … incorporates the terms of a settlement agreement, the court retains ancillary jurisdiction to enforce the agreement because a breach of the incorporated agreement is a violation of the dismissal order."); *Sea Hawk*, 439 F.3d at 549 ("Where a settlement agreement led to the dismissal of a case, a court has jurisdiction to vindicate its authority or effectuate its decree if the court's dismissal order explicitly retained jurisdiction or incorporated the terms of the settlement agreement."); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (holding that where a dismissal order contains a provision retaining jurisdiction over a settlement agreement, "a breach of the [settlement] agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist").

The Dismissal Order provides that the Court retains jurisdiction to enforce the Lodgepole Settlement Agreement: "The Court shall retain jurisdiction with respect to the following limited matters: … overseeing and entering orders as may be necessary to enforce the terms of the Lodgepole Settlement." Dismissal Order at ¶5. The Lodgepole Settlement Agreement provides that "any and all disputes between the Parties herein concerning this Agreement shall be resolved by the Bankruptcy Court, which relief may be sought by motion." Lodgepole Settlement Agreement at ¶20. Because the Dismissal Order contains both a retention of jurisdiction provision and incorporates the Lodgepole Settlement Agreement by reference, the Court has ancillary jurisdiction to enforce the Lodgepole Settlement Agreement. Enforcing the Lodgepole Settlement Agreement is necessary in order for the Court to "vindicate its authority and effectuate its decrees." *Sea Hawk*, 439 F.3d at 549.

The Settlement Agreement's Nondisparagement Provision is Not Specific and Definite Enough to be Enforceable by Means of the Court's Contempt Power

A settlement agreement is enforceable under the Court's contempt powers if the order dismissing the case incorporates the settlement agreement. In *Kelly v. Wengler*, the Ninth Circuit upheld the enforcement of a settlement agreement through the court's contempt powers because the dismissal order "explicitly incorporated the parties' stipulation" (the stipulation, in turn, incorporated the settlement agreement). 822 F.3d at 1091 (9th Cir. 2016). "The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191 (9th Cir. 2003).

The Dismissal Order incorporates the Lodgepole Settlement Agreement by providing that the Court retains jurisdiction for the purpose of "overseeing and entering orders as may be necessary to enforce the terms of the Lodgepole Settlement." Consequently, the provisions of the Settlement Agreement constitute orders of the court that are enforceable by means of contempt, provided that those provisions are "specific and definite." *Dyer*, 322 F.3d at 1191. As the Supreme Court has explained:

> The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.

Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967).

The Nondisparagement Provision is not sufficiently specific and definite to be enforceable through the Court's contempt power. The Nondisparagement Provision states:

> The Parties agree not to disparage any of the other Parties and shall refrain from using inflammatory language and making unsubstantiated accusations of fraud, dishonesty, or wrong-doing against each other, … in any further communications or documents filed in connection with any judicial, quasi-judicial, equitable, administrative, or regulatory proceedings of any nature.

Settlement Agreement at ¶13.

The Nondisparagement Provision is ambiguous in key respects. First, the provision prohibits "*unsubstantiated* accusations of fraud, dishonesty, or wrong-

doing." That begs the question: what is required in order for an allegation to be substantiated? Is it enough if the party making the allegation believes it is true? Does that belief have to be reasonable? Or does the allegation have to be supported by a preponderance of the evidence? Or only enough evidence such that counsel filing a complaint premised upon the allegation would not be subject to Rule 11 sanctions? A plausible case could be made on behalf of each of these interpretations.

Indeed, the papers submitted in connection with this Motion corroborate the ambiguity of the qualifier *unsubstantiated*. Taylor submits a declaration stating that the allegations were substantiated because she received text messages in which Barsky admitted to the embezzlement. In response, Barsky claims that the text messages were sent by someone else who had borrowed his phone. If it is true that Barsky did not send the text messages, does that mean that allegations Taylor made based on those messages were unsubstantiated? Or was Taylor's belief that the messages came from Barsky enough to substantiate allegations based on those messages?

As the foregoing discussion illustrates, the Nondisparagement Provision is far too vague to be enforceable by means of the Court's contempt power. The seriousness of contempt demands that any order upon which contempt is based must clearly and definitely set forth exactly what conduct is forbidden. The Nondisparagement Provision lacks the requisite clarity. Accordingly, the Nondisparagement Provision cannot be the basis for the imposition of sanctions or injunctive relief against Lodgepole.

Lodgepole Did Not Violate the Settlement Agreement by Issuing Barsky the Form 1099 or by Asserting that Barsky was Responsible for an Embezzlement Loss in its 2012 Amended Tax Return

Barsky contends that Lodgepole violated the Settlement Agreement's Release Provision by attributing an embezzlement loss to Barsky on its 2012 Amended Tax Return, and by issuing to Barsky a Form 1099 that reported that Barsky received income in connection with the embezzlement. **[Note 1]** The Court finds that Lodgepole's issuance of the Form 1099 was not a violation of the Settlement Agreement.

Through the Release Provision, Lodgepole released Barsky of "any and all manner of past, present or future actions or causes of actions, liens, encumbrances, deeds of trust, promissory notes, claims, damages, obligations, liabilities, debts, accounts, judgments, demands, costs and expenses (including fees and costs of attorneys and experts) of every kind and description whatsoever, whether known or

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CONT... Edward Gennady Barsky **Chapter 11**

unknown, suspected or unsuspected, fixed or contingent, arising out of or in any way related directly or indirectly to any acts, omissions or transactions described in the Recitals hereto." Settlement Agreement at ¶10. Barsky argues that Lodgepole's report on its 2012 Return of an embezzlement loss constitutes a "claim" against him within the meaning of the Release Provision.

The Court finds that Lodgepole's reporting of the embezzlement loss is not a claim covered by the Release Provision, and that nothing in the Release Provision prohibited Lodgepole from claiming the embezzlement loss on its tax return. Lodgepole's tax return was submitted to the IRS in accordance with Lodgepole's statutory obligations. Although submission of the tax return may have resulted in adverse tax consequences to Barsky, that does not transform the tax return into a "claim" against Barsky. Barsky's tax liability is to the government, not to Lodgepole. To the extent Barsky disagrees with his tax liability, that is an issue between Barsky and the government, not an issue between Barsky and Lodgepole.

The Court further notes that the Settlement Agreement provides that Lodgepole would issue Barsky a Form 1099, but does not specify the content of the Form 1099. Had the parties intended to prohibit Lodgepole from issuing Barsky a Form 1099 that reported income on account of debt cancellation, they could have easily so specified in the Settlement Agreement. In fact, this issue was discussed during negotiation of the Settlement Agreement, and language proposed by Barsky prohibiting Lodgepole from issuing a Form 1099 reporting income was rejected. On September 3, 2013, Lodgepole's counsel informed Barsky's counsel that "after considerable time spent with our tax counsel, we have concluded that there is no practical alternative other than to leave the agreement entirely tax neutral." E-mail from Lodgepole's Counsel to Barsky's Counsel (Opposition at Ex. B). The September 3 e-mail included a redlined version of the settlement agreement that deleted Barsky's proposed language prohibiting Lodgepole from issuing a Form 1099 that reported income.

Barsky next argues that under the contested liability doctrine, Lodgepole should have issued a Form 1099 reporting cancellation of debt, rather than a Form 1099 reporting income. Barsky points to the Recitals in the Settlement Agreement stating that Barsky disputed Lodgepole's claims against him. According to Barsky, any "decently competent tax lawyer or accountant" would have known that because Barsky's liability was disputed, the amount of debt forgiven by the Settlement Agreement could not be treated as income to Barsky. Motion at 26. Therefore, Barsky argues, Lodgepole issued the Form 1099 reporting income to Barsky in bad faith, for the purpose of increasing Barsky's tax liability. This bad faith, Barsky asserts, warrants sanctions pursuant to the Court's inherent authority.

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CONT... Edward Gennady Barsky **Chapter 11**

The Court does not find that Lodgepole issued the Form 1099 in bad faith. The Court has reviewed several hundreds of pages of correspondence between William Weintraub, Barsky's tax counsel, and the California Franchise Tax Board ("CFTB"). In response to CFTB's audit of Barsky, Weintraub presented various arguments as to why the approximately $3.6 million reported on the Form 1099 did not constitute income as to Barsky. Weintraub, a tax attorney with 35 years' experience who charges $700 per hour, did not present to the CFTB the contested liability argument that Barsky raises here. The CFTB auditor ultimately found that the $3.6 million was properly treated as income. The Court acknowledges that CFTB's decision is subject to appeal, and that Weintraub's decision not to present the contested liability argument may have been supported by valid strategic considerations. Nevertheless, Weintraub's failure to raise the argument undermines Barsky's claim that Lodgepole's issuance of the Form 1099 was patently unreasonable. If that were the case, it should have been easy for Weintraub to convince the CFTB of the Form 1099's invalidity, based on the contested liability doctrine. That Weintraub failed to do so shows that the contested liability doctrine is not as straightforward as Barsky contends. Consequently, the Court cannot find that Lodgepole acted in bad faith by issuing a Form 1099 that reported income as to Barsky.

Barsky further argues that issuance of the Form 1099 violated the Nondisparagement Provision by stating that Barsky had embezzled funds. As discussed above, the Court finds that the Nondisparagement Provision is not specific and definite enough to be enforceable via contempt. However, even if the Nondisparagement Provision was enforceable via contempt, Barsky has not established that Lodgepole violated the provision. The Nondisparagement Provision prohibits only "*unsubstantiated* accusations of … wrong-doing" (emphasis added). Had the parties intended to prohibit all accusations of wrong-doing whatsoever, they could have simply omitted the qualifier "unsubstantiated." Lodgepole's assertion in its tax return that Barsky embezzled funds was not unsubstantiated. In a November 8, 2012 e-mail to Brenna Daughtery, Barsky admitted using $3,657,806.99 in Lodgepole funds for personal expenses. **[Note 2]**(The Court emphasizes that it is not finding that Barsky actually did embezzle the funds; it finds only that Lodgepole's claims on its tax returns were sufficiently substantiated so as not to be in violation of the Nondisparagement Provision.)

Lodgepole Did Not Violate the Settlement Agreement by Commencing the Kats Action, Paul Barsky Action, and Coniff Action

Barsky mistakenly argues that Lodgepole violated the Settlement Agreement's

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CONT... Edward Gennady Barsky **Chapter 11**

Release Provision by commencing actions against the Kats, Paul Barsky, and Coniff. Barsky's theory is that in commencing these actions, Lodgepole was relitigating Barsky's liability for embezzlement, an issue that had been released through the Settlement Agreement. **[Note 3]**

Barsky misconstrues the Settlement Agreement. The Release Provision applies only to the "Parties" to the Settlement Agreement—Barsky, Lodgepole Investments, LLC, Lodgepole Fund No. I, LLC, Taylor, Nelya A. Pressman, and St. Tropez Capital. It does not apply to Barsky's parents, his brother, or his accountant. The fact that Lodgepole would have to prove that Barsky embezzled funds in order to prevail on its unjust enrichment claims against the Kats and on its conspiracy claims against Paul Barsky and Coniff does not mean that the Release Provision applies to those parties. Had the parties to the Settlement Agreement wished to include Kats, Paul Barsky, and Coniff, they easily could have done so. **[Note 4]**

Barsky argues that the Release Provision encompasses his family members because the Settlement Agreement applies to Barsky's "members" and "successors in interest." The relevant section of the Release Provision states:

> For and in consideration of the terms set forth herein, the Parties [Barsky, Lodgepole Investments, LLC, Lodgepole Fund No. 1, LLC, Taylor, Nelya A. Pressman, and St. Tropez Capital] hereby irrevocably and unconditionally release and forever release and discharge each other and each of the Parties' respective current and former officers, managers, board members, directors, employees, members, attorneys, representatives, insurers, predecessors and successors in interest from any and all manner of past, present or future actions or causes of actions ….

Barsky's interpretation is inconsistent with the plain language of the Release Provision. Consistent with the rule of interpretation *noscitur a sociis* ("it is known from its associates"), the Court construes the terms *members* and *successors in interest* in light of the surrounding terms. Those surrounding terms include *current and former officers, managers, board members, directors, employees, attorneys, representatives, and insurers*. Given the context in which it appears, *members* means members of the LLCs referenced in the agreement, not members of Barsky's family. **[Note 5]**

Nor do Barsky's family members fall within the scope of the term *successors in interest*. Although Barsky's parents and brother allegedly received some of Lodgepole's funds from Barsky, that does not make them *successors in interest*. Barsky cites no authority in support of this creative construction of the term *successors in interest*.

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CONT... Edward Gennady Barsky **Chapter 11**

Based on the foregoing, the Motion is DENIED. Lodgepole shall submit a conforming order, incorporating this tentative ruling by reference, within seven days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Nathaniel Reinhardt or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1

The Court rejects Lodgepole's argument that the doctrine of unclean hands prevents Barsky from asserting any claims relating to Lodgepole's tax return. Lodgepole asserts that Barsky has unclean hands because he fraudulently obtained Lodgepole's tax return. The Court finds that there was nothing fraudulent about Barsky obtaining Lodgepole's 2012 tax return. Barsky was able to obtain the return only because Lodgepole had listed Barsky as a 50% partner through the entire year 2012. Otherwise, the IRS never would have sent Barsky a copy of the return.

Note 2

In a supplemental declaration, Barsky denies sending text messages confessing his guilt to Taylor on November 26, 2012. Barsky claims that the messages were sent by his former business partner, Maksym Cherniavskyi. Barsky does not deny that he sent the November 8, 2012 e-mail to Brenna Daughtery admitting that he used Lodgepole funds for personal expenses.

Note 3

The Court rejects Lodgepole's argument that Barsky has no standing to assert that the actions against Paul Barsky and the Kats violated the Settlement Agreement.

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CONT... Edward Gennady Barsky **Chapter 11**

Although Barsky was not legally required to pay the legal fees of his brother and parents, he did in fact pay those fees, and therefore has standing to assert that he was injured on the theory that the Paul Barsky and Kats Action violated the Settlement Agreement.

Note 4

Because the Court finds that the prosecution of the Kats Action was not a violation of the Settlement Agreement, the Court does not reach the issue of whether the Anti-Injunction Act prevents the Court from enjoining the Kats Action. Similarly, the Court does not reach the issue of whether the *Rooker-Feldman* doctrine requires the Court to find, as the state court did, that the Kats Action did not violate the Settlement Agreement.

Note 5

Barsky cites *In re Mortgage Fund '08 LLC*, 541 B.R. 467, 468 (Bankr. N.D. Cal. 2015) for the proposition that *members* should include Barsky's family members. *Mortgage Fund* is inapposite, because the "members" referred to in the settlement agreement at issue in *Mortgage Fund* were members of an LLC, not family members. Further, unlike the language at issue in *Mortgage Fund*, the language of the Release Provision is not ambiguous.

Party Information

Debtor(s):

Edward Gennady Barsky

Represented By
Howard S Levine
Anastasija Snicarenko
Tania M Moyron

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

11:00 AM
2:15-21626 Theodosios Roussos **Chapter 7**
Adv#: 2:15-01404 Ehrenberg v. Roussos et al

#100.00 Hearing
RE: [395] Order Requiring Parties to Appear and Show Cause Why Trial in this Action Should not be Bifurcated

Docket 0

Tentative Ruling:

10/4/2016

Hearing required.

Party Information

Debtor(s):

Theodosios Roussos	Pro Se

Defendant(s):

ONEWEST BANK N.A.	Pro Se
Chase Bank N.A.	Pro Se
Paula Roussos	Represented By Robert A Weinberg
Does 1 Through 50	Pro Se
Paula Roussos	Pro Se
Theodosios Roussos	Pro Se
CIT Bank, N.A. f/k/a OneWest Bank	Represented By Gregory K Jones
O.F. Enterprises, L.P., a California	Represented By Daniel J McCarthy
Harry Roussos	Represented By

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CONT... Theodosios Roussos **Chapter 7**

	Jonathan Shenson
Theodosios Roussos	Pro Se
LIRO, INC., a California corporation	Represented By Daniel J McCarthy
Christine Roussos	Represented By Jonathan Shenson
S.M.B. Management, Inc., a	Represented By Daniel J McCarthy
S.M.B. Investors Associates, L.P., a	Represented By Daniel J McCarthy

Plaintiff(s):

Howard M. Ehrenberg	Represented By Ira Benjamin Katz Robert A Weinberg Daniel A Lev Steven Werth

Trustee(s):

Howard M Ehrenberg (TR)	Represented By Daniel A Lev Steven Werth

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

11:00 AM

2:15-21624 Harry Roussos **Chapter 7**

Adv#: 2:15-01406 EHRENBERG v. Roussos et al

#101.00 Hearing
RE: [373] Order Requiring Parties to Appear and Show Cause Why Trial in this Action Should not be Bifurcated

Docket 0

Tentative Ruling:

10/4/2016

Hearing required.

Party Information

Debtor(s):

Harry Roussos	Represented By David Burkenroad - DISBARRED - Jonathan Shenson

Defendant(s):

Paula Roussos	Pro Se
Christine Roussos	Represented By Jonathan Shenson
S.M.B. Management, Inc., a	Represented By Daniel J McCarthy
Does 1 Through 50	Pro Se
Theodosios Roussos	Pro Se
Paula Roussos	Pro Se
CIT Bank, N.A. f/k/a OneWest Bank	Represented By Gregory K Jones
O.F. Enterprises, L.P., a California	Represented By

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CONT... Harry Roussos **Chapter 7**

	Daniel J McCarthy
Theodosios Roussos	Pro Se
Harry Roussos	Represented By Jonathan Shenson
Chase Bank N.A.	Pro Se
S.M.B. Investors Associates, L.P., a	Represented By Daniel J McCarthy
LIRO, INC., a California corporation	Represented By Daniel J McCarthy
One West Bank N.A., formerly	Pro Se

Plaintiff(s):

HOWARD M EHRENBERG	Represented By Ira Benjamin Katz Robert A Weinberg Daniel A Lev Steven Werth

Trustee(s):

Howard M Ehrenberg (TR)	Represented By Daniel A Lev Steven Werth Ira Benjamin Katz Robert A Weinberg

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, October 05, 2016 **Hearing Room 1568**

11:00 AM

2:15-21624 Harry Roussos **Chapter 7**

#102.00 HearingRE: [571] Motion to Approve Compromise Under Rule 9019 Chapter 7 Trustee's Motion for Order Authorizing "Settlement Agreement and Limited Releases by and Among Howard M. Ehrenberg as Chapter 7 Trustee, O.F. Enterprises, S.M.B. Investors Associates, Liro, Inc., S.M.B. Management, Inc. and Lula Michaelides" Pursuant to Rule 9019 of the Bankruptcy Procedure; Memorandum of Points and Authorities; Declaration of Howard M. Ehrenberg in Support Thereof (Lev, Daniel)

Docket 571

Tentative Ruling:

10/4/2016: For the reasons set forth below, GRANT Motion.

Pleadings Filed and Reviewed [Note 1]:

1) Chapter 7 Trustee's Motion for Order Authorizing Settlement Agreement and Limited Releases ("Motion") [Doc. No. 571]
   a) Application for Order Setting Hearing on Shortened Notice [Doc. No. 572]
   b) Declaration of Howard M. Ehrenberg in Support of Application for Order Setting Hearing on Shortened Notice [Doc. No. 573]
   c) Declaration of Ira Benjamin Katz Re Service [Doc. No. 575]
   d) Order Granting Application and Setting Hearing on Shortened Notice [Doc. No. 577]
   e) Notice of Hearing [Doc. No. 579]
   f) Declaration of Andrea Gonzalez Re Notice and Service of Hearing [Doc. No. 580]
2) Joinder in Trustee's Motion of O.F. Enterprises, S.M.B. Investors Associates, Liro, Inc., S.M.B. Management Inc. and Lula Michaelides [Doc. No. 582]
3) Opposition of Theodosios Roussos and Paula Roussos to Motion to Approve Compromise ("Opposition") [Doc. No. 583]
   a) Proof of Service [Doc. No. 585]
4) Supplement to Chapter 7 Trustee's Motion for Order Authorizing Settlement Agreement [Doc. No. 584]
5) CIT Bank, N.A.'s Conditional Non-Opposition to Motion [Doc. No. 397, Adv. No. 2:15-ap-01406-ER]

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CONT... Harry Roussos **Chapter 7**

a) Proof of Service [Doc. No. 398, Adv. No. 2:15-ap-01406-ER]

6) Supplement to Chapter 7 Trustee's Motion [Doc. No. 586]

For the reasons set forth below, the Motion is GRANTED.

I. Facts and Summary of Pleadings

Background

The Chapter 7 Trustee ("Trustee") commenced these actions to recover two real properties on August 4, 2015. **[Note 2]** On December 21, 2015, the Court entered an order enjoining an arbitration (the "Arbitration") between Harry and Theodosios Roussos "to the extent it affects, directly or indirectly, title to, or ownership of" the Properties (the "Arbitration Injunction"). Doc. No. 92. **[Note 3]** The Court found that if "the Arbitration continues, title to and ownership of the Properties will likely be transferred or otherwise impaired, circumscribing the Bankruptcy Court's ability to determine the issues raised in the Complaint. The Court must enjoin the Arbitration to preserve its jurisdiction." Ruling Granting Preliminary Injunction [Doc. No. 87].

On January 25, 2016, Theodosios and Paula Roussos appealed the issuance of the Arbitration Injunction to the District Court. Doc. No. 120. On June 27, 2016, the District Court affirmed the issuance of the Arbitration Injunction. On July 26, 2016, Theodosios and Paula Roussos appealed the District Court's affirmance to the Ninth Circuit. The Ninth Circuit appeal has been fully briefed and oral argument has been tentatively scheduled for January 2017.

On May 25, 2016, the Court entered an order confirming that the Arbitrator, Judge Shook, could appoint a managing director of S.M.B. Investors Associates, L.P., S.M.B. Management, Inc., O.F. Enterprises, Ltd., and Liro, Inc. (the "Four Entities") without violating either the Arbitration Injunction or the automatic stay. *See* Order Confirming that the Automatic Stay and the Court's Previous Order Enjoining the Arbitration Do Not Apply to Bar the Arbitrator from Appointing a Managing Director of S.M.B. Investors Associates, L.P., S.M.B. Management, Inc., O.F. Enterprises, Ltd., and Liro, Inc. ("Management Order") [Doc. No. 551, Case. No. 2:15-bk-21624-ER]. The Management Order provides in relevant part:

> The Court confirms that neither the Arbitration Injunction nor the automatic stay arising in the jointly-administered Chapter 7 bankruptcy cases of Harry and Theodosios Roussos bar the Arbitrator, Judge John H. Shook, Ret., from taking the following actions:
>
> 1) Appointing a managing director who will manage the affairs of S.M.B.

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CONT... Harry Roussos **Chapter 7**

Investors Associates, L.P.; S.M.B. Management, Inc.; O.F. Enterprises, Ltd.; and Liro, Inc. (the "Purchaser Entities"), and who will have the following responsibilities:

a) Hiring counsel to represent the Purchaser Entities in Adv. No. 2:15-ap-01406-ER and 2:15-ap-01404-ER (the "Adversary Proceedings") and in the jointly-administered Chapter 7 bankruptcy cases of Harry and Theodosios Roussos (Case Nos. 2:15-bk-21624-ER and 2:15-bk-21626-ER).

b) Hiring counsel to represent Harry and Theodosios Roussos in the Adversary Proceedings and the related Chapter 7 bankruptcy cases. **[footnote omitted]**

c) For the purpose of paying counsel for the Purchaser Entities and for Theodosios and Harry Roussos in the Adversary Proceedings and the related Chapter 7 bankruptcy cases, borrowing funds against the following properties:
   i) 39 Paloma Avenue, Venice, CA 90291 ("Paloma Property");
   ii) 2209 Ocean Front Walk, Venice, CA 90291 ("Ocean Front Property");
   iii) 580 West E. Street, Colton, CA 92324 ("Colton Property").

d) Paying new counsel for the Purchaser Entities and for Theodosios and Harry in the Adversary Proceedings and the related Chapter 7 cases from the net revenue of the Paloma, Ocean Front, and Colton properties. To the extent that any profits are paid to the record title owners of the San Vicente and Abbott Kinney Properties as provided in ¶2.G of the Order Continuing Hearing on Motion to Appoint Receiver, Etc. and Approving Oral Stipulation Re Property Management ("Property Management Order"), **[footnote omitted]** such profits may be used to pay counsel; provided, however, that nothing in this order authorizes either the Arbitrator or the managing director to interfere with the Chosen Manager's **[footnote omitted]** operation of the San Vicente and Abbott Kinney Properties; and further provided that the terms of the Property Management Order remain controlling with respect to the management and operation of the San Vicente and Abbott Kinney Properties.

Management Order at 1–2.

On June 6, 2016, Judge Shook appointed Sarah Daly as the managing director of

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S.M.B. Management, Inc. and Liro, Inc. Judge Shook's order provides:

> PLEASE TAKE NOTICE that pursuant to the authority granted to me by all of the above-referenced parties in this binding arbitration, and in accordance with the attached Order of the Honorable Ernest M. Robles, United States Bankruptcy Judge, authorizing the Arbitrator to select a director for Liro, Inc. and S.M.B. Management, Inc., Sarah Daly is hereby appointed as the managing director to manage the affairs for Liro, Inc. and S.M.B. Management, Inc., effective immediately. A copy of the Order from Judge Robles dated May 25, 2016 authorizing the Arbitrator to select this new managing director and setting forth the scope of the new managing director's authority is attached hereto as Exhibit "A".

Order No. Twenty-Seven (27) Re: Appointment of Managing Director [for] S.M.B. Management, Inc. and Liro, Inc. (Motion at Ex. B).

Liro is the general partner of O.F. and S.M.B. Management Inc. is the general partner of S.M.B. Investors Associates, so Judge Shook's order has the effect of appointing Ms. Daly as the managing director of all of the Four Entities.

Ms. Daly hired Daniel McCarthy of Hill, Farrer, and Burrill LLP to defend the Four Entities against the Trustee's litigation. Ms. Daly subsequently hired Matthew Lesnick of Lesnick, Prince and Pappas LLP to pursue settlement negotiations with the Trustee. On September 30, 2016, the Court granted Mr. McCarthy's motion to withdraw as trial counsel for the Four Entities. The Court's decision was based on a breakdown in communication between Mr. McCarthy and Ms. Daly, combined with the fact that Mr. McCarthy's fees had not been paid.

On September 28, 2016, the Trustee filed a motion seeking approval of a settlement agreement ("Settlement Agreement") with the Four Entities. The Court scheduled a hearing on the motion on shortened notice. On October 3, 2016, the Trustee filed a supplement setting forth minor modifications to the Settlement Agreement, based on the fact that Harry and Christine Roussos had agreed to become parties to the settlement.

Summary of the Proposed Settlement Agreement

The material terms of the proposed Settlement Agreement are as follows:

In full satisfaction of the Trustee's claims against the Four Entities and Harry and Christine Roussos (the "Settling Defendants"), the Trustee will accept a payment of $11 million (the "Settlement Amount"). The Settling Defendants have delivered to the

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Trustee an executed Stipulation for Entry of Judgment, which includes a form of stipulated judgment to be entered against the Settling Defendants (the "Property Judgment"). The Property Judgment provides that the 1994 Sale Order shall be deemed void *ab initio*, and that title to each of the Properties shall revert back to the way it was immediately prior to the entry of the Sale Order; that the Properties are properties of the Roussos Brothers' estates; and that the adversary proceeding shall be dismissed, with prejudice, against the remaining defendants as soon as the order approving the Settlement Agreement has become final and non-appealable and the Settlement Amount has been paid.

The Settlement Agreement shall be effective upon entry of an order by the Bankruptcy Court approving the Settlement Agreement, provided that no stay of the order is in effect (the "Effective Date"). Upon the Effective Date, the Settling Defendants shall immediately turn over possession and control of the Properties to the Trustee. The Trustee shall market the San Vicente Property for no fewer than 90 days but no longer than 180 days.

If the net proceeds of the sale of the San Vicente Property are insufficient to pay the Settlement Amount, the Trustee may market and sell the Abbot Kinney Property. If the net proceeds of the sale of the San Vicente Property are sufficient to pay the Settlement Amount, the Trustee shall promptly transfer title of the Abbot Kinney Property back to O.F.

The Trustee shall manage the Properties as rental apartments until they are sold. To the extent that revenue from the combined operation of the Abbot Kinney Property and San Vicente Property exceed costs of operation, such net proceeds shall be applied towards payment of the Settlement Amount.

Lula Michaelides is not a party to these adversary proceedings but is the largest creditor of the Roussos Brothers' bankruptcy estates. Michaelides holds a Non-Dischargeable Judgment against the Roussos Brothers. Michaelides asserts that the Four Entities are the alter egos and under the control of Harry and Theodosios. Michaelides contemplates filing a complaint in the Superior Court of the State of California against the Four Entities for compensatory damages in excess of $15 million, plus punitive damages (the "Alter Ego Action").

In settlement of the Alter Ego Action, the Settling Defendants have delivered to Michaelides an executed Stipulation for Entry of Judgment, which includes a form of stipulated judgment to be entered against the Settling Defendants (the "Alter Ego Judgment"). The Alter Ego Judgment provides for a judgment in favor of Lula and against the Settling Defendants, jointly and severally, in the amount of $1.5 million. If Harry and Christine support approval of the Settlement Agreement and waive any

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right to object to Michaelides' claims, and take no action to remove Sarah Daly as director of the Four Entities, Michaelides will limit collection of the Non-Dischargeable Judgment to any monies distributed to her in the Roussos Cases on account of any claims that she may file.

After the judgment executed in support of the Settlement Agreement is filed and recorded, the Trustee requests that the Court vacate the Arbitration Injunction.

Summary of the Joinder of the Four Entities

Matthew Lesnick filed a Joinder to the Motion on behalf of the Four Entities. The Joinder may be summarized as follows:

Theodosios Roussos and his non-bankruptcy attorneys have already sent numerous threatening communications to the Four Entities asserting the position that Ms. Daly does not have authority to enter into the Settlement Agreement. In a September 22, 2016 e-mail, Theodosios Roussos wrote:

> Sarah,
>
> Please see the memo below that my attorney sent to the entities' attorney Dan McCarthy. I wanted to confirm that you received this message. I will pursue every available legal remedy against you no matter how long it takes if you continue to act against the best interest of the entities by not paying Dan and trying to sign a settlement agreement that you know you are not authorized to sign.

Daly Decl. at Ex. B.

Robert Clarkson, who represents Theodosios in the Arbitration, wrote:

> If [Ms. Daly] dares to act in this manner or enters into an illegitimate settlement with the bankruptcy trustee, she would be wise to make sure the bankruptcy trustee agrees to fully indemnify her from the legal fees she will incur defending herself and any resulting judgment, which could include punitive damages which, by law, I don't think the bankruptcy trustee can even indemnify her against. She is playing a risky game, and if she knows anything, she knows that Ted will never give up until his dying breath in his pursuit of Ms. Daly.

Daly Decl. at Ex. C.

The Court should find that Ms. Daly is authorized to enter into the Settlement Agreement, and that the Entities are settling in good faith. Such a finding is necessary to avoid further litigation. As a result of the Statement of Decision and Judgment in Binding Arbitration ("Arbitrator's Decision") issued by Judge Shook on September 14, 2016, Ms. Daly is authorized to enter into the Settlement Agreement. S.M.B.

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Management, Inc. is the general partner of S.M.B. Investors Associates, L.P. ("SMB") (the owner of the San Vicente Property). Liro, Inc. is the general partner of O.F. Enterprises, Ltd. ("OF") (the owner of the Abbot Kinney Property).

Judge Shook found that limited partners SMB and OF were incapable of functioning because they were controlled by the Roussos Brothers, who "have developed major and substantive differences of opinion concerning the management and general operation of the family business." Arbitrator's Decision at 2–3. Judge Shook ruled that "partition by sale appears to be the only answer and must be granted." *Id.* at 3. Judge Shook recognized that the OF and SMB Partnership Agreements contained provisions prohibiting partition, but held that he had the authority to modify the Partnership Agreements "as needed to further the goals of equity, including excusal or modification of contractual terms." *Id.* at 6. Accordingly, Judge Shook modified the Partnership Agreements "to strike and delete the waivers to the right to partition in order to equitably remedy the dissension among the co-owners of the properties." *Id.* Judge Shook ordered that the "Properties shall be partitioned for sale" and "marketed to third parties to obtain the great values for the parties." *Id.* at 11.

The Partnership Agreements provide that limited partners OF and SMB have the right to vote to approve the general partner's decision to sell all or substantially all of the partnership assets. However, Judge Shook's decision to partition and sell the Partnership's assets has eviscerated the limited partner's right to vote on a sale of assets. Accordingly, the general partner (acting through Ms. Daly in her capacity as managing director) is free to sell or transfer the properties according to her best business judgment.

Summary of Theodosios and Paula Roussos' Opposition

Theodosios and Paula Roussos' Opposition to the Motion may be summarized as follows:

First, Sarah Daly lacks authority to enter into the Settlement Agreement on behalf of the Four Entities. The Partnership Agreements require at least 50% of the owners of the limited partnerships (OF and SMB) to consent to a transfer of assets. Because Theodosios has not consented to OF and SMB's transfer of assets, the requisite 50% approval cannot be obtained.

The Partnership Agreements also prohibit the general partner (SMB Management and Liro) from agreeing to a confession of judgment. Ms. Daly has violated this provision by agreeing to entry of judgments in favor of Lula Michaelides and the Trustee.

S.M.B. Investors Irrevocable Trust and O.F. Management Irrevocable Trust

(collectively, the "Trusts") own a 99% limited partnership interest in SMB and OF. The Trust Agreements required Ms. Daly to obtain the joint approval of Harry and Theodosios, as co-trustees of the Trusts, before entering into the Settlement Agreement. Ms. Daly did not obtain Theodosios's approval. Because the Settlement Agreement is inconsistent with the Partnership Agreements, it is void under California law.

Second, Matthew Lesnick, who negotiated the Settlement Agreement on behalf of the Four Entities, is not disinterested. Mr. Lesnick has represented the Trustee in nineteen adversary actions that were filed in 2014. The extent of Mr. Lesnick's relationship with the Trustee has not been fully disclosed. As a result of Mr. Lesnick's conflict, the Settlement Agreement is not at arms-length.

Third, Theodosios and Paula have had inadequate time to respond to the motion to approve the Settlement Agreement. The Motion should be continued to permit Theodosios and Paula time to take discovery and to more fully present their arguments against the Motion.

Fourth, the Arbitrator's Decision has not been confirmed as final and is therefore not enforceable. *See O'Hare v. Mun. Res. Consultants*, 107 Cal. App. 4th 267, 278 (2003) ("Regardless of the particular relief granted, any arbitrator's award is enforceable only when confirmed as a judgment of the superior court.").

Summary of CIT's Conditional Non-Opposition

CIT holds a promissory note ("Note") and deed of trust secured by the San Vicente Property. CIT's Deed of Trust provides that CIT has the option to declare all indebtedness against the San Vicente Property due and payable if the property is sold.

CIT has no objection to the Settlement Agreement provided: (i) the order approving the Settlement Agreement specifically recognizes CIT's secured claim against the Property, (ii) the Trustee confirms that he will timely make the monthly payments due under the Note as part of his obligation to manage the Property until the Property is sold, (iii) the order approving the Settlement Agreement specifically provides that CIT's claim (including any reimbursable expenses and attorneys' fees) will be satisfied with the proceeds of the sale, and (iv) in the event not paid, CIT has the right to foreclose without moving to vacate the stay, a right that it possesses at the present time with respect to SMB.

II. Findings and Conclusions

Sarah Daly Has Authority to Enter into the Settlement Agreement

The Court that the Four Entities, acting through Sarah Daly, have the authority to

enter into the Settlement Agreement. Harry and Theodosios subjected themselves to the decisions of Judge Shook by agreeing to binding arbitration. Judge Shook appointed Sarah Daly as the managing director of Liro and SMB Management. Because Liro is the general partner of OF and SMB Management is the general partner of SMB, Judge Shook's order has the effect of making Ms. Daly the managing director of all of the Four Entities.

In his order appointing Ms. Daly as the managing director, Judge Shook incorporated by reference this Court's Management Order, which set forth the scope of Ms. Daly's authority. The Management Order provides that Ms. Daly has the authority to "manage the affairs" of the Four Entities. The Management Order specifies that Ms. Daly's responsibilities include hiring and paying counsel to represent the Four Entities. The Court finds that the Management Order bestows upon Ms. Daly the authority to enter into the Settlement Agreement. Ms. Daly's authority to "manage the affairs" of the Four Entities necessarily includes the authority to settle litigation in which the Four Entities are involved. Ms. Daly's authority to settle is reinforced by the Management Order's provisions permitting Ms. Daly to hire counsel to represent the Four Entities. The authority to hire counsel would be meaningless if it did not also include the authority to direct counsel to either settle or continue to defend against the Trustee's litigation.

Theodosios argues that the Settlement Agreement is void because it provides for the sale of the Properties in contravention of the SMB and OF Partnership Agreements. Theodosios' argument overlooks the effect of the Arbitrator's Decision. The Arbitrator's Decision directs that the Properties are to be marketed and sold, and specifies that this sale is to occur even if the voting requirements of the Partnership Agreements are not satisfied. Although the Arbitrator's Decision has not been confirmed by the Superior Court, California Code of Civil Procedure §1278.6 provides that an arbitration decision "that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration." Therefore, the previous contractual provisions of the Partnership Agreement have been superseded by the Arbitrator's Decision. Consequently, Theodosios' contractual rights to disapprove the sale of the Properties have been eliminated. While the Arbitrator's Decision is presently stayed, that stay will be removed once the Court vacates the Arbitration Injunction.

The Parties Have Entered Into the Settlement Agreement in Good Faith Within the Meaning of California Code of Civil Procedure §877.6

Under California Code of Civil Procedure §877.6(a)(1), "[a]ny party to an action

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in which it is alleged that two or more parties are joint tortfeasors ... shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff ... and one or more alleged tortfeasors ...." "A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor ... from any further claims against the settling tortfeasor ... for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." §877.6(c).

The purpose of §877.6 is to ensure that "the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries." *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal. 3d 488, 499, 698 P.2d 159, 166 (1985). In making a determination under §877.6(a)(1), the Court must take into account "a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants." *Id.* Finally, a "defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." *Id.*

The Court finds that the Settling Defendants have entered into the Settlement Agreement in good faith within the meaning of Cal. Code Civ. Proc. §877.6(a). In view of the strength of the Trustee's case, the settlement figure is not grossly disproportionate to what a reasonable person would estimate the defendants' liability to be. The Settlement Agreement does not allocate a disproportionate share of liability on non-settling defendants Theodosios and Paula Roussos. The cost of the Settlement Agreement is born by the Four Entities, in which both Theododios and Harry hold ownership interests. The only advantage that Harry and Christine obtain by entering the Settlement Agreement that is not available to non-settling defendants Theodosios and Paula is a limitation on the collection of Michaelides' Non-Dischargeable Judgment (a judgment which Michaelides already holds against both Harry and Theodosios), and three to six months of rent-free living in the San Vicente Property. In view of the $11 million Settlement Amount, these advantages are relatively inconsequential. There is no evidence that the settling defendants engaged in any fraudulent or collusive conduct to the injury of the non-settling parties. Finally, there is no evidence or merit to Theodosios' contentions that the Settlement Agreement is not at arms-length or that Mr. Lesnick has a conflict prohibiting him from exercising

his duties as counsel to the Four Entities.

The A&C Properties Factors Support Approving the Settlement Agreement

Bankruptcy Rule 9019(a) permits the Court to approve a compromise or settlement. "In determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider: (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises." *Martin v. Kane (In re A&C Properties)*, 784 F.2d 1377, 1381 (9th Cir. 1986). "[C]ompromises are favored in bankruptcy, and the decision of the bankruptcy judge to approve or disapprove the compromise of the parties rests in the sound discretion of the bankruptcy judge." *In re Sassalos*, 160 B.R. 646, 653 (D. Ore. 1993). In approving a settlement agreement, the Court must "canvass the issues and see whether the settlement 'falls below the lowest point in the range of reasonableness.'" *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983).

Applying the *A&C Properties* factors, the Court finds that the Settlement Agreement is fair and reasonable.

Probability of Success in the Litigation

The Trustee has a strong likelihood of succeeding in the litigation. However, any litigation victory would almost certainly be appealed. Theodosios has asserted numerous challenges to the Trustee's claims, including (1) that the Trustee has no ability to collaterally attack the Sale Order since its findings that the Properties were over-encumbered and sufficiently marketed are res judicata; (2) the Properties or the Trustee's claims were abandoned under §554(a) and the Trustee lacks the requisite standing to vacate the Sale Order; (3) the Trustee has failed to state a claim under Rule 60(d); and (4) the defense of *in pari delicto* precludes the Trustee from asserting claims against the Four Entities.

The Settlement Agreement will result in funds for the estate now and resolves numerous disputes between the party. Therefore, this factor weighs in favor of approving the Settlement Agreement.

Difficulties in the Matter of Collection

Even if the Trustee obtained judgment in his favor, there is the risk that the Debtors would continue to obstruct the Trustee's collection efforts. For example,

during an appeal of any judgment the Trustee obtains, the Properties could be damaged through lack of maintenance, or the Debtors could seek to cloud title.

This factor weighs in favor of approving the Settlement Agreement because the Settlement Agreement provides that the Trustee will receive title to and physical control over the Properties.

Complexity of the Litigation

This litigation is complex and trial would be lengthy. The Court has indicated its preference to try this matter in phases. The first phase alone (to determine whether there has been fraud upon the Court) is scheduled for 5 court days. The second phase (to determine the scope and amount of remedies if fraud is determined) will occupy a probably longer trial. Therefore, it would also be expensive for the estate to take this matter to trial, and to defend against subsequent appeals. This factor weighs in favor of approving the Settlement Agreement.

Paramount Interests of Creditors

The Settlement Agreement will allow creditors to receive approximately 100% of their claims. This factor weighs in favor of approving the Settlement Agreement.

CIT's Conditional Non-Opposition

CIT's request that it be permitted to foreclose upon the San Vicente Property without seeking stay-relief in the event payments under it Note are not made is denied. CIT's other requests are granted. The order approving the Settlement Agreement should recognize CIT's secured claim; the Trustee should confirm that he will make monthly payments due under CIT's Note until the San Vicente Property is sold; and the order approving the Settlement Agreement should provide that CIT's claim will be satisfied from the proceeds of sale.

Conclusion

Based upon the foregoing, the Court APPROVES the Settlement Agreement. The Trustee shall submit a conforming order.

Note 1

The motion to approve the settlement agreement was filed in the main bankruptcy case, 2:15-bk-21624-ER. Other than the papers listed in the "Pleadings Filed and Reviewed" section, all citations to the docket are to the related adversary proceeding—Adv. No. 2:15-ap-01406-ER (identical pleadings have been filed in

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companion Adv. No. 2:15-ap-01404-ER).

Note 2

The properties are located at 2727–2741 Abbott Kinney Boulevard, Venice, CA ("Abbot Kinney Property") and (2) a 30-unit building located at 153 San Vicente Boulevard, Santa Monica, CA ("San Vicente Property") (collectively, the "Properties").

Note 3

Unless otherwise indicated, all citations to the docket are to Adv. No. 2:15-ap-01406-ER. Identical pleadings have been filed in related Adv. No. 2:15-ap-01404-ER.

Party Information

Debtor(s):

Harry Roussos	Represented By David Burkenroad - DISBARRED - Jonathan Shenson

Trustee(s):

Howard M Ehrenberg (TR)	Represented By Daniel A Lev Steven Werth Ira Benjamin Katz Robert A Weinberg